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In the Supreme Court of the United States

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OCTOBER TERM, 1971

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL., PETITIONERS

v.

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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The Solicitor General, on behalf of the federal petitioners, and the Corporation Counsel of the District of Columbia, on behalf of the District of Columbia petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, 1a) is not yet reported. The opinion of the district court (Pet. App. E, 67a) is reported at 316 F. Supp. 754.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 1971 (Pet. App. B, 62a). A timely petition for rehearing was denied on December

2, 1971 (Pet. App. C, 64a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The statutes involved are Title 23, United States Code, Sections 109, 128, 134 and 138, and Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 815, *et seq.* These statutes are reproduced as Appendix H, *infra*, pp. 213a–216a.

QUESTIONS PRESENTED

1. Whether the regional planning, safety, environmental protection, and location hearing provisions of 23 U.S.C. bar the Secretary of Transportation from authorizing federally assisted highway projects until "final plans" have been prepared.

2. Whether Section 23 of the Federal-Aid Highway Act of 1968 precludes the application of those provisions of 23 U.S.C. which would delay commencement of construction of the Three Sisters Bridge beyond the 30-day period specified in Section 23.

STATEMENT

This controversy arises out of the proposed construction of the Three Sisters Bridge over the Potomac River between the Georgetown waterfront in the District of Columbia and Spout Run in Virginia. The full history of this litigation is set forth in the most recent opinion of the district court, 316 F. Supp. 754, at 758–761 (Pet. App. 67a–73a), and may be summarized as follows:

Following the decision in *D.C. Federation of Civic Associations* v. *Airis*, 391 F.2d 478 (C.A.D.C.), which

held that the District of Columbia was illegally proceeding with plans for the bridge in violation of certain provisions of Title 7 of the D.C. Code, Congress on August 23, 1968, enacted Section 23 of the Federal-Aid Highway Act of 1968. That Section required the District of Columbia, "Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, * * *" to begin construction of the Three Sisters Bridge within 30 days, with such construction to "be carried out in accordance with all applicable provisions of title 23 of the United States Code." In December 1968 the National Capital Planning Commission adopted a comprehensive transportation plan which did not include the Three Sisters Bridge (Pet. App. 70a).[1] The D.C. Council approved that plan and, in January 1969, the bridge was deleted from the interstate highway system (Pet. App. 70a). In August 1969, the D.C. Council reversed its previous action and the Secretary of Transportation directed the bridge's reinstatement in the interstate system. A contract for preliminary construction was let in September 1969 (Pet. App. 71a).

In October 1969, the respondents filed this suit seeking to enjoin further construction until the District of Columbia and the Department of Transportation had complied with, *inter alia,* certain provisions of 23 U.S.C. and Title 7 of the D.C. Code. The denial by the district court of the respondents' motion for a

[1] The regional planning agency, the Transportation Planning Board of the Washington Council of Governments, has approved the Three Sisters Bridge project continuously since December 1967 (Pet. App. 146a).

preliminary injunction was affirmed by the court of appeals on October 31, 1969 (Pet. App. 72a). After a hearing, the district court on January 12, 1970, ruled for the petitioners, holding that Section 23 of the Federal-Aid Highway Act constituted a directive from Congress that the project should go forward as soon as possible, and without the necessity of compliance with planning provisions of Title 23 which would delay the commencement of construction. On April 6, 1970, the court of appeals reversed this ruling, and remanded the case for an evidentiary hearing to ascertain whether petitioners had complied with the provisions of Title 23 (Pet. App. 157a; 434 F. 2d 436).

Following ten days of trial, more than 100 exhibits, and over 1,500 pages of transcript (which included a full day of testimony by Secretary of Transportation John A. Volpe), the district court issued a 43-page opinion (316 F. Supp. 754, Pet. App. 67a–152a) enjoining construction of the bridge until the defendants had complied with the design hearing requirements of Section 128 and the safety requirements of 109,[2] but holding that in all other respects, the District of Columbia and the Secretary of Transportation had complied with the requirements of Title 23.

---

[2] The government has since held Section 128 design hearings. In contrast to the later holding of the court of appeals, the district court found it consistent with Section 109(a) for the Secretary to let contracts for pier excavations, in order to explore the subsurface conditions, but it enjoined actual construction of the bridge until it was found structurally feasible. Subsequent model testing has since confirmed the structural feasibility of the proposed bridge.

The case was again presented to the court of appeals by appeals and cross-appeals. On October 12, 1971, a majority of the appellate court panel held that the petitioners had failed to comply with any of the provisions of Title 23 considered by the district court. The court found that the petitioners had not complied with Section 138 (parklands); Section 134 (continuous comprehensive transportation planning); Section 109(a) (safety and structural feasibility); and Section 128 (location hearing) (Pet. App. 1a). The court of appeals remanded the case "to the District Court with directions that it return the case to the Secretary [of Transportation] for him to perform his statutory function in accordance with this opinion" (Pet. App. 32a).[2] A timely petition for rehearing and suggestion of rehearing *en banc* was denied (Pet. App. 62a, 64a).

REASONS FOR GRANTING THE WRIT

The decision below construing the planning, safety, environmental protection and location hearing pro-

[2] One member of the majority panel, Chief Judge Bazelon, declared that extraneous political pressure from members of Congress, who sought to expedite construction of the bridge by blocking appropriations for the District of Columbia subway system, was by itself sufficient to invalidate the Secretary's actions, even if there had been formal compliance with the applicable statutes (Pet. App. 23a–31a). Since the judge concurring to constitute the majority found it "unnecessary to decide the case on this independent ground" and was "not entirely convinced" that "extraneous pressure had influenced the Secretary's decision" (Pet. App. 25a–26a), there is no majority finding of such impropriety in this case. We therefore do not consider Chief Judge Bazelon's views on that subject in this petition.

visions of Title 23 (23 U.S.C. 134, 109, 138, 128) to prevent the Secretary and Department of Transportation from authorizing highway projects until final plans are prepared misconceives the purpose of these provisions and the nature of the highway planning and building process, and imposes requirements on the Department inconsistent with the proper discharge of its duties in implementing the federal highway program. Compliance with the court of appeals' view of the Department's statutory obligations would, in most instances, result in substantial delays and require substantial additional expenditure of public funds and would, in some instances, be almost impossible. Review by this Court is needed to resolve these important differences between the responsible government agency and the court below concerning the basic manner in which the federal highway program is to be administered under the governing statutes.

Moreover, the decision below and the previous decision of the court of appeals frustrated the intent of Congress that construction of the Three Sisters Bridge should commence within thirty days of the enactment of the Federal-Aid Highway Act of 1968 and that only those provisions of Title 23 which did not delay construction would be applicable to this particular project. The court's failure to comply with Congress' specific directive concerning this bridge also, we submit, warrants this Court's review so that the case can be considered in its full statutory context.

1. The court of appeals set aside nearly every determination of fact and law made in favor of the peti-

tioners.[4] The court of appeals held that the absence of final plans invalidated each determination required to be made by the Secretary under Title 23 before the Three Sisters Bridge project could commence. We submit that, with respect to each of the Secretary's determinations, the information before him was adequate and was all that is required or, indeed, appropriate, under the statutes at issue. For, under these provisions of Title 23, the Secretary has a continuing obligation to assure that the planning, safety, and environmental requirements will be observed as plans are developed during the course of the project—and not merely after the final plans have been made. And, as the dissenting judge below noted, adequate judicial review is assured by the possibility of subsequent attack if it develops that the final plans do not meet the statutory standards (Pet. App. 43a).

SECTION 134

Section 134 requires that any highway project in an urban area approved by the Secretary be "based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities * * *." The determination of compliance with this standard here was delegated to the Division Engineer of the Bureau of Public Roads, Mr. Charles Hall. In 1965 Mr. Hall recognized the Transportation Planning Board (TPB) of the Washington

[4] While we believe the court of appeals exceeded the proper scope of appellate review under Rule 52, Fed. R. Civ. P., in setting aside the district court's carefully documented factual findings, we limit our discussion to what, we submit, were the court of appeals' errors of law relating to the questions presented in this petition.

Council of Governments (COG) as the relevant organization to refer to for regional planning "carried on cooperatively by States and local communities" in the National Capital area (Def. Exh. 10). The COG is an organization composed of the local governments of the District of Columbia and several local jurisdictions in Maryland and Virginia in the greater metropolitan area. The TPB is the transportation planning arm of the COG (Pet. App. 146a). Thus the TPB is the only regional transportation planning agency in the process of developing comprehensive transportation plans.[5] At the time Mr. Hall made his determination under Section 134, in August or September of 1969, he knew of TPB's approval of the Three Sisters Bridge in 1967 (Pet. App. 146a), as well as its continuing review of the project (Pet. App. 146a). The district court approved the Department's determination.

The court of appeals rejected the Department's determination on several grounds.[6] At bottom, however, the court of appeals held that no regional planning approval could be given to the Three Sisters Bridge project until the final plans were drawn. "[W]e

[5] The District of Columbia government itself has recognized the TPB as the appropriate agency for Section 134 determinations (Pet. App. 147a; Def. Exh. 12). The National Capital Planning Commission (NCPC), referred to by the court of appeals, is, by contrast, a strictly local planning agency of the District of Columbia.

[6] The court of appeals found an improper delegation to the TPB based on Mr. Hall's statement that he "look[ed]" to the TPB (Pet. App. 13a); however, Mr. Hall's "look[ing]" to the TPB appears proper since the comprehensive planning upon which the Section 134 determination is to be made is planning "*by* States and local communities".

would still have difficulty accepting the Department's finding without some explanation of how the Section 134 determination could be made before plans for the bridge are finalized" (Pet. App. 14a).

The requirement of "finalized" plans for each project before it may be considered to be "based on a continuing comprehensive transportation planning process" misconceives the requirements of the Act and the nature of regional transportation planning. The Act requires that individual projects be based upon regional planning, not that regional plans be based upon final plans for individual projects. It is noteworthy that, as the court of appeals observed in a different context, the Act refers to "planning," not plans. This choice of terms was deliberate. As the Senate and House Committees explained:

> The committee recognizes that transportation planning is almost invariably a continuing process; hence, this section has been drawn in such way as to make it clear that *a completed comprehensive plan*, as such, *is not necessary* to meet its requirements. [S. Rept. 1997, p. 25; H. Rept. 1948, p. 13, 87th Cong., 2d Sess. (1962); (emphasis added)].[7]

Long term transportation planning requires "the development of transportation systems, embracing various modes of transportation in a manner that will serve the States and local communities efficiently and effec-

[7] It is thus without significance, as the district court observed, that the TPB had not finally adopted a comprehensive plan. It is undisputed that the TPB approval was based upon its planning process. The fact that the local planning agency, NCPC, had promulgated a final plan—omitting the bridge—did not entitle the NCPC's opinions to greater weight.

tively" (23 U.S.C. 134). Once it is determined that a road or a bridge, in a described location, will serve the transportation needs of a region, the project may be said to be "based on a continuing comprehensive transportation planning process." The requirement of final plans before a project may be included in a "transportation system" would reverse the logical order of integrated regional planning and substitute a Balkanized patchwork of complete but unrelated designs. Moreover, the requirement of final plans on each particular project before the planning determination is made could waste substantial public funds in creating individual plans which might later be found to be inconsistent with regional needs.

SECTION 109

The determinations with regard to the safety of the project were also made for the Department by Mr. Hall. When Mr. Hall approved the project on September 2, 1969, he had before him "the plans, specifications, and estimates for the construction of the piers for the Three Sisters Bridge which had been submitted to him by the District of Columbia Department of Highways and Traffic" (Pet. App. 137a). At the time of this approval preliminary preconstruction borings had been conducted but were, as of then, inconclusive. The district court held that the Department had properly let contracts for exploratory excavations and borings, but held that the bridge itself should not be constructed until it was determined to be structurally feasible and safe.

The court of appeals again set aside the district

court's finding of compliance with Section 109(a) at the time contracts were let for pier construction, holding that the statute requires a final conclusion as to safety before any actual construction work can begin (Pet. App. 16a). The court of appeals' requirement that all safety testing be done "on paper" (Pet. App. 16a) ignores Mr. Hall's testimony, relied on by the district court, "that it is only after the commencement of the actual excavation for the pier foundations that the engineers can be certain that subsurface conditions are sufficient to support the piers" (Pet. App. 138a; Tr. 604.) In this instance a requirement of final plans would seriously thwart the building process by requiring conclusions to be reached "on paper" which can only conclusively be reached as the building process begins. The contracts in this case, like all other government contracts, anticipate and accommodate problems, such as subsurface conditions, that may be encountered in building by means of a modification clause allowing changes to meet such unforeseen difficulties.

SECTION 138

Section 138[8] of Title 23 prohibits the Secretary from approving projects which will require the use of parklands or historic sites unless he finds that "(1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm" to such

[8] Section 18 of the Federal-Aid Highway Act of 1968, 82 Stat. 823. The language is identical to that of Section 4(f) of the Department of Transportation Act of 1966, as amended, 49 U.S.C. 1653(f).

lands.[9] The Secretary of Transportation[10] testified that in August of 1969 when he assessed the environmental impact of the Three Sisters Bridge under Section 138 he had before him the bridge design in an artist's rendering which had been approved by the Fine Arts Commission (Tr. 804, 728, 723). Moreover, as the district court observed, "preliminary planning for the ramps and interchanges * * * had been done at that time" (Pet. App. 103a). While the Secretary conceded that "we did not have the complete design available as to exactly the degree of the turns" and "we did not pin down to a tenth of an acre the amount of land that would be required" (Tr. 736–737), he stated that the approaches had been narrowed to two alternatives (Tr. 737).

The district court held that the Secretary's determination based on these preliminary plans adequately satisfied Section 138, in view of the Secretary's recognition of a continuing obligation to assure "that the designs which would be developed based on the

[9] Judicial notice may be taken of the fact that any bridge constructed across the Potomac River between Virginia and the District of Columbia will necessarily encroach on parkland.

[10] We note that in remanding the case to the Secretary for the development of "a full-scale administrative record" (Pet. App. 32a) the court of appeals ignored this Court's recent decision in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402. That decision held that formal findings were not required in the kind of administrative decision-making here involved and that, where the administrative record was inadequate for judicial review, the testimony of the decision-maker could compensate for that lack. The district court in this case anticipated *Overton Park* by taking extensive testimony of Secretary Volpe to compensate for the "lack of any meaningful administrative record" (Pet. App. 92a).

preliminary plans would result in a minimum taking of parkland" (Pet. App. 103a).

The court of appeals rejected the findings of the Secretary and the district court, holding that "[a]bsent a finalized plan for the bridge it is hard to see how the Department could make a meaningful evaluation of 'harm'" (Pet. App. 11a). But "a finalized plan for the bridge" is not needed for this determination. Section 138 is not concerned with reinforcing rods or the placement of rivets in "finalized plans". It is concerned with the impact that the bridge and its approaches will have on parklands. These matters were known. Requiring final plans before the use of parkland can be approved or disapproved would be unduly costly because it would require the detailing of matters which are unrelated to the ends of the statute. Here again the statute calls for "a program [which] includes all possible *planning* to minimize harm" to the park area (emphasis added). The opinion below appears to envisage that all planning be done at one time and codified in "final plans", and is contrary to the statute's requirement of a dynamic program to minimize harm.

SECTION 128

Public hearings with respect to the location of the projected bridge across the Potomac were held in November 1964. The possible locations considered were based upon a study prepared by a consulting engineering firm (Plf. Exh. 10, Pet. App. 110a). One of the locations then considered was that of a bridge whose ter-

mini would be 950 feet downstream on the Virginia shore and 1500 feet downstream on the District of Columbia shore from the site of the Three Sisters Bridge as it is now planned. The district court ruled that the presently planned location was not a "new location" which would require a new location hearing under the Department's Policy and Procedure Memorandum implementing Section 128.

The court of appeals set aside this determination with the observation that "the differences in the plans [might], in fact, have a substantially different impact on both shores" (Pet. App. 19a). This again is the finality requirement reintroduced as a speculation. The original location hearing included consideration of locations all the way from the vicinity of Theodore Roosevelt Island downstream from Key Bridge to a location 2400 feet upstream from the Three Sisters Islands in the vicinity of the George Washington Reservoir (Pet. App. 111a), including a bridge only a few hundred yards from the present site. The Department therefore had before it at the time of the hearing views of residents and affected persons governing every conceivable location. The court of appeals' suggestion that a new location hearing might be appropriate for every minor variation of the original project plans in effect would require the location hearing to be held only after final plans have been made. This would frustrate the purpose of location hearings, which is to consider community reaction to alternative locations *before* planning has reached a stage which would

make changes impractical, unduly expensive or incongenial to the planning authority.

In sum we believe that the court's construction of Title 23 as requiring final plans before relevant determinations can be made is contrary to the purposes of that Title and would impede its efficient administration by the Department. We believe the better rule was suggested by the court of appeals itself, in a footnote from which, we submit, its holding departs (Pet. App. 14a, n. 42):

> The Secretary is not required, of course, to resolve every conceivable ambiguity in a proposed plan before testing its compliance with the applicable statutory provisions. But where he does purport to make a determination required by statute, for example under § 134, in advance of the completion of planning, his determination must remain flexible and be subject to continuing reconsideration as the plans for the project mature.

Perhaps the requirement of final plans "on paper" would facilitate the process of judicial review by creating a document which the reviewing court can hold up against the statute. But such a rule would prevent the responsible officials from making their decisions at the times in the planning and building process when they can best be made—and when Congress intended them to be made. As we have noted, allowing decisions to be made at the proper time and place in the planning process will not prevent the courts,

at the appropriate time, from reviewing the Department's administration of the Act. As the dissenting judge below observed:

> "If it subsequently develops that the final plans for some phase of the project do not meet the statutory standards they may be attacked at that time. Alternatively, the preliminary plans could be attacked upon a showing that they did not meet statutory standards" [Pet. App. 43a].

2. The intent of Congress that the Three Sisters Bridge be constructed and that "the government of the District of Columbia shall commence work on" it within 30 days after the enactment of Section 23 of the Federal-Aid Highway Act of 1968 has been thwarted by the court of appeals. The erroneous 1970 interpretation of Section 23 by the court of appeals, 434 F. 2d at 446 (Pet. App. 157a), reaffirmed in its latest decision (Pet App. 1a), disregards the plain language of the Act and the supporting legislative history in determining that all provisions of Title 23, however time-consuming, must be met prior to starting construction.

The congressional directive that this particular bridge be constructed, as planned, without further delay is, we submit, a complete answer to the present litigation. The thirty days specified in Section 23 was obviously not enough time in which to begin again the planning of this bridge or to hold additional hearings. Congress had clearly approved the bridge as planned and located. Hearings had been held, and redoing the preliminary work would have been redundant. The

plain words of the 1968 Act, taken as a whole and in the light of the history of this bridge, eliminate the need for redoing the already accomplished preliminary planning.

Any doubts that Section 23 meant that the bridge was to be constructed and work was to begin within 30 days are removed by an examination of the relevant legislative history. For present purposes we refer to only three expressions of congressional intent."[11]

The statement signed by seven managers on the part of the House, which is contained in the Conference Report, sets forth in the most positive terms the intent to have the bridge constructed without holding any additional public hearings or seeking the approval of any individual or group respecting the necessity for, the location of, or the design of the bridge. It states:

> In early 1966 an agreement was reached among all affected parties as to the location of the Three Sisters Bridge. Consultant engineers have completed a type-size-and-location report on the bridge.
>
> The specific design for the bridge was approved by the Fine Arts Commission on September 20, 1967. In writing to the Department of Highways and Traffic granting its approval, Mr. William Walton, Chairman of the Fine Arts Commission, stated in part: "We felt your designer had performed brilliantly in creating

[11] We invite the Court's attention to the discussion of this matter in greater detail in the dissenting opinion below (Pet. App. 182a–211a).

a design for one of the most important scenic sites around the Capital. Its simplicity and its daring both are very commendable characteristics."

The decision of the Fine Arts Commission in this respect safeguards the aesthetic values of concern to so many and preserves the beauty and recreational characteristics of the Potomac River. The design approved by the Fine Arts Commission shall be carried out precisely as approved with respect to materials and architecture.

The National Capital Planning Commission approved the general alinement of the bridge on September 15, 1966, and the geometrics on May 2, 1967, subject to certain reviews by the Department of Transportation. The Department of Transportation by letter to the National Capital Planning Commission in February of 1968 returned the decision to local prerogatives. The bridge location and geometric shall therefore proceed as presented to the National Capital Planning Commission in September of 1966 and May of 1967 with no further actions required by that or any other body.

With respect to the scheduling of construction, the Congress directs that the first substructure contracts be advertised for construction within 90 days of the enactment of this legislation [H. Rept. No. 1799, 90th Cong., 2d Sess. 1968, p. 34–35].

See also the introduction of the Conference Report in the House by Congressman Wright (114 Cong. Rec. 23710).

The court of appeals brushed aside the Statement of the House Managers as mere dictum, not expressing the will of the Senate conferees (Pet. App. 173a, n. 38). Contrary to the implication sought to be drawn by the court of appeals, however, the Senate clearly understood the import of Section 23. It was explained to the Senate by Senator Randolph (Chairman of the Senate conferees) as follows (114 Cong. Rec. 24030):

> One of the most difficult issues before the conference was that involving the District of Columbia interstate highway program. The language of the House bill required immediate construction of those highways in the District of Columbia as contained in the 1968 cost estimate. The Senate bill had no comparable language.
>
> The Senate conferees approached this matter with reluctance and reservation. We did not believe that this was a matter that should be handled in a national highway act. However, in the interest of comity and with the desire to bring a bill out of conference, we proposed certain changes in the House language and in the give-and-take which ensued, the language of section 23 of the conference report was developed.
>
> Under the terms of this section, the District of Columbia government and the Secretary of Transportation are directed to proceed with four projects: The completion of the center leg to New York Avenue; the construction of the east leg; the Potomac River Freeway; and the Three Sisters Bridge. * * *

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1972.

APPENDIX A

United States Court of Appeals for the District of Columbia Circuit

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No. 24,838

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.,

APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

No. 24,843

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.,

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION,

APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.

WALTER J. HICKEL, SECRETARY OF INTERIOR, ET AL.,

APPELLANTS

Appeals from the United States District Court for the District of Columbia

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Decided October 12, 1971

Before BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and MACKINNON, Circuit Judge.*

*Judge MacKinnon dissents, but in the interests of expediting this matter consents to the immediate release of the majority opinion and reserves his right to file a dissenting opinion.

BAZELON, Chief Judge. This appeal injects us back into the midst of a long and sometimes acrimonious imbroglio over the proposed construction of a bridge across the Potomac River from Virginia into the District of Columbia. In an earlier appeal we held that the so-called Three Sisters Bridge could not be built except in compliance with the hearing, environmental protection, safety, and other provisions of federal law applicable to the construction of federally-assisted highway projects.[1] That question, accordingly, is no longer open. We must now decide whether the Department of Transportation did, in fact and in law, heed the applicable federal statutes when it decided that the bridge should be built. On the basis of an extended factual inquiry, the District Court concluded that the Department had failed to comply with some of the provisions.[2] We affirm that part of the District Court's judgment. As to the provisions with which the

[1] D.C. Federation of Civic Ass'ns, Inc. v. Volpe, —— U.S. App. D.C. ——, 433 F.2d 436 (1970), holding that "both the planning and building of the Three Sisters Bridge [must] comply with all applicable provisions of Title 23." *Id.* at 447. In their complaint before the District Court on remand plaintiffs alleged that the Secretary had not complied with the following provisions: 23 U.S.C. §§ 102, 103, 128(a), 134, 138, and 317 (1970), and the regulations implementing § 128(a), 23 C.F.R. Part 1, App. A (1970). Apart from alleged violations of title 23, plaintiffs also complained of violations of various sections of title 7 of the District of Columbia Code, and of 16 U.S.C. §§ 1, 470; 33 U.S.C. §§ 401, 403, 525; and 49 U.S.C. § 1655 (1970). At the commencement of trial, the District Court granted plaintiffs' motion to amend their complaint to allege also a violation of 23 U.S.C. § 109(a) (1970). The Court granted plaintiffs a hearing on each complaint under title 23, but not under any of the other statutory provisions. *See* pp. 21–23 *infra*; D.C. Federation of Civic Ass'ns, Inc. v. Volpe, 316 F. Supp. 754, 761 & nn. 13–14 (D.D.C. 1970).

[2] 316 F. Supp. 754 (D.D.C. 1970).

District Court found compliance, however, we have concluded that the statutory requirements were not satisfied, and the case will therefore be remanded to afford the Secretary an opportunity to make appropriate determinations as required by the statute.

The factual background of this dispute has been described in detail in our earlier opinion[3] and in the opinion of the District Court.[4] Briefly stated, the controversy concerns a projected bridge between the Georgetown waterfront in the District of Columbia and Spout Run in Virginia. The bridge, which would be part of the Interstate Highway System and would be built largely with federal funds, would traverse the Three Sisters Islands, would "affect the Georgetown Historic District,"[5] and would use some parkland. The precise amount of harm to parkland and historic sites has not yet been determined, however, since the planning of the bridge—including the approaches and access roads—is not yet finalized.[6] A source of continuous controversy since its conception, the proposed bridge was deleted from the Interstate Highway System in January, 1969, when the National Capital Planning Commission, the official planning body for the District, adopted "a comprehensive transportation plan which did not include the Three Sisters Bridge."[7] The bridge was redesignated part of the Interstate System six months later after Representative Natcher, Chairman of the Subcommittee on the District of Columbia of the House Appropriations Committee, indicated unmistakably that money for construction of the District's subway system would

[3] —— U.S. App. D.C. ——, 434 F.2d 436 (1970).
[4] 316 F. Supp. 754 (D.D.C. 1970).
[5] *Id.* at 769.
[6] *Id.* at 774.
[7] *Id.* at 759.

be withheld if the bridge plan were not revived.[8] To satisfy the Chairman, it was necessary, first, for the District of Columbia City Council to reverse its earlier position,[9] and vote to approve the project. On August 9, 1969, the District government so voted, with the swing members loudly protesting that they would not have changed their votes but for the pressures exerted by Representative Natcher.[10] The second prerequisite of redesignation was a decision by Transportation Secretary Volpe that the project should go ahead as part of the Interstate System. He announced that decision on August 12, 1969, and the project sprang full-blown back to life on the following day.

On April 6, 1970, we held that the hearing and planning requirements of title 23 of the United States Code were fully applicable to this project notwithstanding a 1968 Act directing that construction of the bridge begin not later than thirty days after the Act's passage.[11] We remanded the case to the trial court for an evidentiary hearing to determine whether the Secretary had complied with the pertinent provisions in concluding that the project should be revived. The case is before us on appeal and cross-appeal from the trial court's decision.

I.

Given our earlier decision, the Secretary's approval of the bridge must be predicated on compliance with

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[8] *Id.*

[9] On Jan. 17, 1969, the District's City Council had voted to approve the NCPC transportation plan which rejected the Three Sisters Bridge as unnecessary and undesirable. *Id.*

[10] *Id.* at 764, 767.

[11] Pub. L. No. 90-495, 82 Stat. 827 (1968); *cf.* pp. 22-23 *infra*.

a number of statutory provisions. Plaintiffs [12] challenge with two lines of argument the District Court's finding of compliance. First, they maintain that the Secretary's determinations under the statute were tainted by his consideration of extraneous factors unrelated to the merits of the questions presented. They allege—and argue, moreover, that the District Court specifically found—that pressures exerted by Representative Natcher contributed to the decision to approve the bridge. Second, they argue that quite apart from the allegations of pressure, the record and applicable legal principles do not support a finding of compliance. The two strands of argument are plainly related, in plaintiffs' view, since the alleged shortcomings under each statutory provision illustrate and lend substance to the argument that the rational, impartial evaluation of the project envisioned by the statute was impermissibly distorted by extraneous pressures. We consider first plaintiffs' argument that the determinations could not stand even if there were no issue of extraneous pressure.

A. REQUIREMENTS OF § 138

If a proposed federally-assisted highway project would encroach on parkland or historic sites, the Secretary of Transportation must determine before construction can begin that there is "no feasible and prudent alternative to the use of such land," and, assuming such a finding, that "the project includes all

[12] For purposes of this opinion we refer to the D.C. Federation of Civic Associations, appellants (and cross-appellees) in this Court, as "plaintiffs," and to Secretary Volpe, the District of Columbia, and the other appellees (and cross-appellants) as "defendants."

possible planning to minimize harm to such park . . . or historic site."[12] The District Court concluded that Secretary Volpe had complied with each of these requirements.

In defending the Secretary's action, the government can hardly maintain that there was no "feasible" alternative to construction of the Three Sisters Bridge. This exemption applies, as the Supreme Court indicated in *Citizens to Preserve Overton Park, Inc. v. Volpe*, only if the Secretary finds that "as a matter of *sound engineering* it would not be feasible to build the highway along any other route."[13] It could still be argued, however, that the Secretary rejected each of the feasible alternatives because none of them was "prudent." In construing this second exemption, the Supreme Court pointed out that

> the very existence of the statute indicates that protection of parkland was to be given paramount importance. The few green havens that are public parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.[14]

Our review of the Secretary's determination is hindered not only by the lack of any formal findings, but also by the absence of a "meaningful administrative record within the Department of Transportation evidencing the fact that proper consideration has been

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[12] U.S.C. § 138 (1970).

[13] 401 U.S. 402, 411 (1971) (emphasis added).

[14] *Id.* at 412–13.

given to the requirements of this section." [15] However regrettable, the failure to provide explicit findings indicating why all possible alternatives to the bridge would be unfeasible or imprudent does not, in itself, invalidate the Secretary's action.[16] But the complete non-existence of any contemporaneous administrative record is more serious. Absent a record, judicial review of the Secretary's action can be little more than a formality [17] unless the District Court takes the disfavored step of requiring the Secretary to testify as to the basis of his decision.[18] And even the Secretary's "*post hoc* rationalizations," [19] filtered through a fact-finder's understandable reluctance to disbelieve the testimony of a Cabinet officer, will rarely provide an effective basis for review. Furthermore, it is hard to see how, without the aid of any record, the Secretary could satisfactorily make the determinations required by statute. The absence of a record, in other words, simultaneously obfuscates the process of review and signals sharply the need for careful scrutiny.

Secretary Volpe's testimony before the District Court did little to allay the doubts generated by the

[15] 316 F. Supp. at 769.

[16] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 409 (1971). *But see* note 88 *infra*.

[17] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 ("review [of the Secretary's decision] is to be based on the full administrative record that was before the Secretary at the time he made his decision"). *See also* Environmental Defense Fund, Inc. v. Ruckelshaus, —— U.S. App. D.C. ——, ——, 439 F.2d 584, 598 (1971).

[18] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971); United States v. Morgan, 313 U.S. 409, 422 (1941).

[19] *Cf.* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971) ("Such an explanation will, to some extent, be a '*post hoc* rationalization' and thus must be viewed critically.").

lack of an administrative record. Indeed, his testimony—on occasion uncertain and inconsistent with the testimony of others[20]—itself gives rise to at least a serious question whether he considered all possible alternatives to the plan eventually approved. It is clear, moreover, that the Department of Transportation failed to apply its own procedures generally applicable to determinations under § 138.[21] That failure is especially disquieting since the procedures at issue were designed specifically to insure that determinations under § 138 would be made, in the Secretary's words, only after "a great amount of real independent and genuine review [by] people who were not prticularly highway oriented * * *."[22]

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[20] Secretary Volpe testified, for example, that he "believed that he had consulted with Mr. Braman's office with respect to the Bridge project." (Transcript at 808-09), but Mr. Braman pointed out that his office was "not involved in the Three Sisters matter at any time." (Tr. at 1085). The Secretary also testified that the Federal Highway Administrator, Mr. Turner, had discussed with him the §138 problem, and that the Administrator had made an oral recommendation. (Tr. at 722). Nevertheless, Mr. Turner indicated in his testimony that he did not believe he had made any recommendation to the Secretary or had even discussed with him the specific question of the determination under § 138. (Tr. at 977). *See generally* Brief for Appellants at 34-35. Asked about his consideration of a number of alternatives to the Three Sisters Bridge, Secretary Volpe testified that he could not recall having considered the possibility of a tunnel at "any location other than the Three Sisters Islands," (Tr. at 780), upgrading the Jefferson Davis Highway to Interstate standards (Tr. at 779), or a number of other potential alternatives. *See* Brief for Appellants at 36-38.

[21] 316 F. Supp. at 769-70. The procedures in question involved the Department's Office of Environmental and Urban Systems, headed by Mr. James Braman.

[22] Tr. at 644 (testimony of Secretary Volpe).

Furthermore, an apparent misconception about our earlier decision may itself have distorted the Secretary's determination under § 138. The government has read our earlier opinion to mean that a bridge must be built, albeit in accordance with the provisions of title 23, somewhere in the vicinity of the proposed Three Sisters Bridge. Congress did direct, as we previously indicated, "that a bridge be built over the Potomac following the general configurations laid out in the cost estimates."[23] Viewed in context, however, the statement does not convey the meaning which the government suggests, for we held that "nothing in the statute indicates that Congress intended the bridge to be built contrary to its own laws."[24] If the bridge cannot be built consistently with applicable law, then plainly it must not be built. It is not inconceivable, for example, that the Secretary might determine that present and foreseeable traffic needs can be handled (perhaps by expansion of existing bridges) without construction of an additional river crossing. In that case, an entirely prudent and feasible alternative to the Three Sisters Bridge might be no bridge at all,[25] and its construction would violate § 138. Thus, the Secretary may have disregarded one possible prudent and feasible alternative to the use of parkland and historic sites on the mistaken assumption that that alternative was foreclosed by our earlier decision.[26]

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[23] ___ U.S. App. D.C. ___, 434 F. 2d at 446.

[24] *Id.* at 447.

[25] *Cf.* Environmental Defense Fund, Inc. v. Corps of Engineers, 325 F. Supp. 749, 761 (E.D. Ark. 1971).

[26] Testifying before the District Court, Secretary Volpe did indicate that he "had considered several alternatives including the bridge, *no bridge*, the tunnel, various types of ramp connections etc. . . ." (Tr. at 742) (emphasis added). It is

While these difficulties give rise to at least a substantial inference that the Secretary failed to comply with § 138, that inference ripens into certainty when one turns to the second determination required by § 138. Before the project can begin, the Secretary must determine that all possible planning has been done to minimize harm to the affected parkland and historic sites. Yet the District Court found, and the Secretary apparently concedes, that final design of the ramps and interchanges is not yet complete. Thus, when Secretary Volpe purportedly complied with § 138 in August, 1969, he could at best have been "satisfied . . . that the designs which *would be* developed based on the preliminary plans *would* result in a minimum taking of parkland,"[27] but he could not have concluded that the necessary planning had already been done. The District Court reasoned that the expectation of future planning could satisfy § 138. But that reasoning seems inconsistent with the Supreme Court's subsequent admonition that § 138 can be obeyed "only if there *has been* 'all possible planning to minimize harm' to the park."[28] Moreover, the District Court approved the § 138 determination on the basis of the Secretary's testimony that a "minimum of parkland would be taken" for the ramps and interchanges.[29] More is at stake, however, than the "mini-

possible, however, that the Secretary might have given that alternative (and the studies which seem to support it, *see* Brief for Appellants at 36 n.2) more extensive consideration if his Department had not been convinced, judging by its representations before this Court, that "no bridge" was not a viable alternative in view of Section 23 of the Federal-Aid Highway Act of 1968.

[27] 316 F. Supp. at 775 (emphasis added).

[28] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 405 (emphasis added).

[29] 316 F. Supp. at 775.

mum taking" of parkland. Section 138 speaks in terms of minimizing "harm" to parkland and historic sites, and the evaluation of harm requires a far more subtle calculation than merely totaling the number of acres to be asphalted. For example, the location of the affected acres in relation to the remainder of the parkland may be a more important determination, from the standpoint of harm to the park, than determining the number of affected acres. The Secretary has not yet determined which acres will be taken. In addition, a project which respects a park's territorial integrity may still, by means of noise, air pollution and general unsightliness, dissipate its aesthetic value, crush its wildlife, defoliate its vegetation, and "take" it in every practical sense.[30]

Absent a finalized plan for the bridge, it is hard to see how the Department could make a meaningful evaluation of "harm." Furthermore, Secretary Volpe did not consult with other planning agencies to coordinate efforts to minimize harm to the park and historic sites.[31] He also made no studies of potential air pollution damage to the park. His approval of the project under § 138 was, in short, entirely premature, and we hold that he must make new determinations consistent with the statutory standards.

B. REQUIREMENTS OF § 134

The Secretary cannot approve federally-assisted highway projects in urban areas unless he finds "that such projects are based on a continuing comprehensive transportation planning process" carried out in

[30] *Compare* Brief for Federal Appellees at 11: "The park areas underneath the bridge would, in essence, remain available for park purpose uses * * *."

[31] 316 F. Supp. at 794.

conformance with Congress's objective of promoting the development of transportation systems.[23] The Secretary reasoned, and the District Court approved his reasoning, that the bridge project was consistent with such a planning process since the bridge had been approved by, and was subject to the continuing scrutiny of, the Transportation Planning Board (TPB) of the Metropolitan Washington Council of Governments. Plaintiffs, on the other hand, emphatically deny compliance with § 134 on the grounds that the "comprehensive transportation plan promulgated by the National Capital Planning Commission (NCPC) in December, 1968, specifically 'rejects the Three Sisters Bridge . . . as being both unnecessary and undesirable.'"[24] While plaintiffs point out that NCPC is the official planning agency for the District of Columbia and that it alone has prepared a comprehensive transportation plan, the government contends that the Council of Governments, unlike the NCPC, is a regional organization which must consider the interests of the surrounding jurisdictions.

We are unwilling to resolve this dispute by some abstract balancing of NCPC disapproval against TPB approval. That approach would, we are convinced, entirely miss the point of § 134. That section does not suggest that the Secretary has satisfied his statutory responsibility as soon as he has found a single plan which incorporates a proposed highway project. Nor can it reasonably be interpreted to mean that the project must be approved by every plan applicable to the affected region. The section speaks, after all, in terms of "planning," not "plans," and it is not

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[23] 23 U.S.C. § 134 (1970).

[24] 316 F. Supp. at 794.

[25] *Id.*

our function to decide that one plan has merit while another does not. Rather, it is for the Secretary to determine whether a particular project will be consistent with sound transportation planning for the region.

Decisionmaking responsibility under § 134 has been delegated by Secretary Volpe to the Public Roads Division Engineer, Mr. Hall. Mr. Hall disregarded NCPC disapproval of the project because he believed that "TPB was the primary agency to which he should look in making his finding."[35] The District Court approved his finding on that same reasoning. But that reasoning cannot do service for the more sophisticated determination required by the statute. In making his "mental" finding[36] of compliance with § 134, Mr. Hall apparently did no more than adopt TPB's conclusion that the project was "consistent with comprehensive planning" for the region.[37] Yet that is precisely the determination that the Department of Transportation, taking into account the recommendations of local plans, must make. The statute plainly does not permit the Department to delegate its statutory responsibility to a local planning agency. On remand, the Department must reevaluate the project in light of the purposes of § 134.

Since the determination was not grounded on a correct understanding of the statute's requirements, we need not now decide whether the substantive result, if reached pursuant to appropriate procedures, would itself be supportable. But to aid the Department's redetermination under § 134, we should make clear our misgivings about the result and our doubts that it

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[35] 316 F. Supp. at 794.

[36] Tr. at 1109.

[37] 316 F. Supp at 794.

could be upheld on the present record even under the constrained standard of substantive review.[38] TPB approved the bridge project in 1967, two years before Mr. Hall made his finding under § 134.[39] No comprehensive transportation plan had been adopted at that time, either by TPB or any other planning agency. NCPC, which did not formulate its plan until December, 1968, was on record at the time of TPB's action in 1967 as approving the bridge project. TPB approved the project not under § 134, but under the Demonstration Cities and Metropolitan Development Act of 1966.[40] NCPC, on the other hand, developed a transportation plan in response to President Johnson's call for the development of a "comprehensive plan for a D.C. highway system" which would permit the Department of Transportation to determine whether the Three Sisters Bridge and other projects would be "appropriate links" in such a plan;[41] it then rejected the bridge proposal. And even if TPB approval were not—at least on its face—stale, inapposite, and unsupported by any underlying, comprehensive plan, we would still have difficulty accepting the Department's finding without some explanation of how the § 134 determination could be made *before* plans for the bridge are finalized.[42] Nothing in the record sug-

[38] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–16 (1971).

[39] 316 F. Supp. at 794.

[40] 42 U.S.C. § 3334 (1970); *see* 316 F. Supp. at 794 n.57.

[41] Statement of President Johnson, August 23, 1968, 114 Cong. Rec. (Part 24) 30959 (1968).

[42] The Secretary is not required, of course, to resolve every conceivable ambiguity in a proposed plan before testing its compliance with the applicable statutory provisions. But where he does purport to make a determination required by statute, for example under § 134, in advance of the completion of

gests that TPB approval—whatever its other apparent shortcomings—embraced each conceivable design that might eventually be adopted.

C. REQUIREMENTS OF § 109(A).

The Secretary's approval of plans for a federally-assisted highway project is conditioned on a determination that the proposed facility will "adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance."[43] The District Court held that planning for the Three Sisters Bridge had not "proceeded to a sufficient degree for the responsible officials to determine that the planned facility is structurally feasible."[44] Accordingly, the Court enjoined construction of the bridge until the planning had advanced to a stage where structural feasibility was assured. We find the District Court's judgment consistent with the statute and the facts presented, and it is therefore affirmed.

Plaintiffs also argue, however, that the project was approved before the Secretary could be certain, first, that river bed conditions would support the bridge, and second, that no safety hazard would arise from the increase in air pollution attributable to traffic on the bridge. Again, we are unable to accept the District Court's disposition. With regard to river bed conditions, the District Court noted that

> [b]efore the construction of a bridge, it is necessary to make extensive investigations of subsurface conditions to determine if they are sufficient to support the foundations for the

planning, his determination must remain flexible and be subject to continuing reconsideration as the plans for the project mature.

[43] 23 U.S.C. § 109(a) (1970).

[44] 316 F. Supp. at 793.

> bridge piers. This is done primarily by means of borings. . . . At the time Mr. Hall approved the plans, specifications and estimates for the pier construction, these borings had not been completed, and subsequently problems developed so that the plans for the project had to be modified.[45]

Called to testify before the District Court, Mr. Hall still could not be certain "that the present planned foundation is adequate."[46] Nevertheless, the District Court found compliance with § 109(a) because of Mr. Hall's testimony "that there is no question that the piers can be built to support the bridge as presently planned."[47] The Department of Transportation is obviously unwilling to construct a bridge known to be unsafe, and during the course of construction the Department would surely verify the suitability of the river bed conditions. But § 109(a) requires not only that the bridge be safe, but also—and no less important—that its safety be ascertained *before* the Secretary approves the project. That requirement minimizes the safety hazards and at the same time insures that public funds will not be squandered on a demonstrably unsafe proposal. Where planning reveals defects in design or location, those defects can be corrected on paper rather than in steel and concrete.

The District Court's findings are not entirely clear as to whether questions about the safety of river bed conditions could be more fully resolved before construction resumes. We hold that if such questions do exist, the Secretary must take steps to resolve them to the fullest practical extent before granting approval of the project under § 109(a).

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[45] 316 F. Supp. at 790.

[46] Tr. at 604.

[47] 316 F. Supp. at 790.

Plaintiffs' second contention under § 109(a) concerns the dangers of air pollution. The District Court concluded that evidence of a potential air pollution hazard was insufficient to support a finding "that the defendants are required to undertake a study of such [air pollution] effects." [48] We can find no basis in the statute's language or purpose for the conclusion that certain hazards are, as a matter of law, immaterial to the Secretary's evalution of a project's safety. The District Court would surely agree that Congress did not intend to permit construction of a bridge in a situation, however rare, where air pollution would be a significant threat to safety. It does not follow, of course, that air pollution will be a significant hazard in all—or even any—highway projects. And the District Court apparently concluded that no extraordinary dangers are likely to arise from the Three Sisters Bridge. Still, the gathering and evaluation of evidence on potential pollution hazards is the responsibility of the Secretary of Transportation, and he undertook no study of the problem. His staff has far greater resources and expertise on this matter than the District Court, and it is possible that a study by the Department would reveal significant dangers which had escaped the attention of the District Court. Inquiry into this issue cannot be foreclosed merely because the District Court found no significant evidence of air pollution hazards. That determination must be made in the first instance by the Secretary of Transportation.[49]

[48] 316 F. Supp. at 791.

[49] We express no opinion at this time on the amount or type of investigation which the Secretary should undertake in evaluating the air pollution hazards. In his testimony before the District Court, Secretary Volpe indicated that his Department

D. REQUIREMENTS OF § 128

Section 128[50] requires that public hearings be held before construction can begin. In the earlier appeal we specifically held applicable to the Three Sisters Bridge project not only § 128, but also the Department of Transportation's implementing regulations.[51] Those regulations require, in certain specified situations, a hearing on project location and a hearing on project design. After exhaustive consideration of the record, the District Court concluded that the Department had not complied with the design hearing requirement, but that the location hearing requirement had been satisfied.

While the government did not admit error with regard to the design hearing, it nevertheless chose to hold the necessary hearing in a commendable effort to reduce the number of issues outstanding. Since the question has now been mooted, we express no opinion on the District Court's conclusion.[52] As for the location

"consider[s] air pollution in the overall consideration of all our projects," Tr. at 811, and it is possible that the consideration already given would satisfy the requirements of the statute. But the District Court made no findings on the Secretary's action, and approved the project apparently because the evidence seemed insufficient, in its view, to warrant a holding that the Department must undertake a study of the problem. 316 F. Supp. at 791. Rather than returning the case to the District Court for clarification of its findings on this point, it seems most efficient, in view of our remand to the Secretary under other provisions, to permit the Secretary to reconsider at the same time his determination under § 109(a).

[50] 23 U.S.C. § 128(a) (1970).

[51] Policy and Procedure Memorandum 20-8, 23 C.F.R. Part I, App. A (1970).

[52] Naturally, we do not decide whether the design hearing held by the Department complied with the requirements of PPM 20-8 and § 128(a). That question has not been presented to us. If plaintiffs have objections to the hearing, those objections should be lodged in the District Court.

hearing, the District Court reasoned that a hearing held in 1964 satisfied the requirement, even though different proposals were the subject of that hearing,[53] since the change in plan was "so insubstantial that the public would not be affected any differently than by the original proposal which formed the basis for the first hearing . . . ."[54] We have no quarrel with the District Court's reasoning, but on the present record we are unable to accept its application to this case. Of the proposals submitted at the 1964 hearing, the one most similar to current plans for the bridge was still off by 1500 feet on the District of Columbia shore and 950 feet on the Virginia shore.[55] Ramps and interchanges as well as the routing of traffic have also been substantially redesigned. Nevertheless, the District Court could not "conceive how any members of the public would be affected differently by the present location than by one of the three" considered in 1964.[56] It is entirely conceivable to us that the differences in the plans would, in fact, have a substantially different impact on persons on both shores. We would be reluctant, of course, to disturb the District Court's finding of fact on this point if it were clear that a finding had actually been made. But there is no indication in the record before us that the District Court gathered evidence on this issue, and we have nothing to support the conclusion but the conclusion itself. Moreover, in making the determinations required by this opinion, the Secretary may conclude that current plans must be abandoned in favor of a new location. Accordingly, we remand this issue to the District Court for

[53] The plan under consideration in 1964, the so-called Howard-Needles report, proposed three possible locations for a central Potomac crossing, 316 F. Supp. at 778.

[54] *Id.* at 779.

[55] *Id.* at 778.

[56] *Id.* at 779.

clarification of the factual basis of its conclusion, and for reconsideration in light of any further location changes the Secretary of Transportation may order.

E. REQUIREMENTS OF §317

If the Secretary determines that lands owned by the United States are needed for a proposed highway project, he must

> file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in land which it is desired to appropriate.[*]

After concluding that the bridge project would use federal parklands under the jurisdiction of the Interior Department's National Park Service, and after noting defendant's admission that a map had not been filed, the District Court still found "compliance with the spirit, if not the letter, of §317." The court based its findings on the consultation between the Transportation and Interior Departments with regard to this project, and on the issuance by the latter of permits for the use of the parkland.

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[*] The District Court made an additional finding of error under §128(a). The section requires that the "State highway department * * * *certify* to the Secretary that it has had public hearings * * * *.*" (emphasis added). The District Court held, and we agree, that the certifying officer "does not be one who knows as a fact that the actions to which he is certifying have been taken." 316 F. Supp. at 789. The District Court found that the certifying officer had assumed that certification was appropriate "merely because the project had reached the stage where the certification is normally made." *Id.* That assumption, the District Court held, was an "insufficient basis for the certification." *Id.* at 790. The defendants do not contest that finding, and it is therefore affirmed.

[1] 23 U.S.C. § 317 (1970).

[2] 316 F. Supp. at 796–97.

We agree with the District Court that the failure to supply a map should not be an absolute bar to the construction of the bridge if the purposes of § 317 have in fact been realized. That section is designed, as the District Court acknowledged, to

> require the Secretary of Transportation to give notice to the Secretary of the Department having control of the land, and provide a means by which the latter may protect any governmental interest in use of the property for purposes other than highway construction.[1]

We need not decide whether the District Court erred in finding compliance with the spirit of § 317. In view of our conclusion that the case must be remanded for new determinations, it would not appear to be a significant burden on the Department to remove all doubts under this section by filing the appropriate map.[2]

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[1] United States v. 9.00 Acres of Land, 433 F.2d 317, 319 (8th Cir. 1970).

[2] Subsequent to the District Court's decision, the National Park Service announced in a letter (a photocopy of which is included in Brief for Appellants) that it does object to at least one aspect of the bridge plan. Letter from George B. Hartzog, Jr., Director, National Park Service, Department of the Interior, to Martin K. Schaller, Executive Secretary, Office of the Mayor-Commissioner, Dec. 15, 1970, reproduced in Brief for Appellants at App. A. That objection, moreover, includes an allegation that current plans for the bridge "conflict with [the Service's] understanding of the terms of an agreement signed May 25, 1966, by the National Park Service" and the Virginia and District of Columbia highway departments. It is precisely that prior—and, perhaps, misconstrued—agreement on which the government now relies to demonstrate compliance with the "spirit" of § 317. The letter may, in other words, have undercut the factual predicate of the District Court's reasoning. Whatever the significance of this attempted supplementation of the record, it is clear that any doubts will be removed by our holding that the Secretary must comply with the letter of § 317.

F. PROVISIONS OTHER THAN TITLE 23

At the hearing below, the District Court barred plaintiffs from presenting evidence on a number of allegations in their complaint because those allegations related to statutory provisions which the District Court found inapplicable to the Three Sisters Bridge project. Thus, the Court concluded that the project was exempted by Congress from compliance with certain provisions of the federal Code, as well as provisions of the District of Columbia Code.[62]

In 1968 we held in *D.C. Federation of Civic Associations, Inc. v. Airis*[63] that this project must comply with pertinent requirements of the D.C. Code. Later that year, Congress directed, in Section 23 of the Federal-Aid Highway Act, that:

> [n]otwithstanding any other provisions of law or any court decision or administrative action to the contrary . . . construction [of the Three Sisters Bridge] shall be undertaken as soon as possible . . . and shall be carried out in accordance with all applicable provisions of Title 23 of the United States Code.[64]

The District Court then held explicitly that the Three Sisters Bridge had been exempted from all of the pre-construction provisions of title 23, and implicitly that the bridge had been exempted from the comparable provisions of the D.C. Code.[65] On appeal from that decision, we held that the bridge must comply with all applicable provisions of title 23. Our opinion

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[62] At issue are 16 U.S.C. §§ 1, 470; 23 U.S.C. §§ 401, 403, and [illegible]; 49 U.S.C. § 1655 (1970), and various sections of title 7 of the District of Columbia Code.

[63] 129 U.S. App. D.C. 125; 391 F.2d 478 (1968).

[64] Pub. L. No. 90-495, 82 Stat. 827 (1968).

[65] 308 F. Supp. 423 (D.D.C. 1970).

did not indicate flatly, however, that the project must also comply with non-title 23 provisions. In view of the District Court's conclusion that compliance with non-title 23 provisions is not required, we must now resolve the ambiguity arguably left by our earlier opinion.

The applicability of these provisions was not squarely faced in the parties' briefs,[66] nor was it discussed at oral argument. While our earlier opinion did make one specific reference to the issue, the parties now draw opposite conclusions from that reference. Discussing section 23's directive that the bridge be built "notwithstanding any . . . court decision . . . to the contrary," we pointed out that

> [p]resumably the "court decision" language refers to our decision in *Airis* [holding D.C. Code provisions applicable to the Three Sisters Bridge], but the reference is mistaken since that decision was not "to the contrary."[67]

Under these circumstances, we are reluctant to resolve the dispute without providing the parties an opportunity to discuss the question on the merits. Accordingly, we defer judgment on this issue to permit the parties to file, within twenty days from the date of this opinion, memoranda dealing with the question.

II

As Part I of this opinion makes clear, the Secretary's determinations failed to comply with a signifi-

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[66] Plaintiffs clearly asked for a ruling in this Court on 16 U.S.C. § 470(f) (1970), and provisions of title 7 of the D.C. Code. They have not explicitly asked for a ruling on any other non-title 23 provision.

[67] D.C. Federation of Civic Assns, Inc. v. Volpe, —— U.S. App. D.C. ——, ——, 434 F. 2d 436, 447 & n.50 (1970).

cant number of title 23 provisions applicable to the Three Sisters Bridge. Taken as a whole, the defects in the Secretary's determinations—in particular, his effort to make the determinations before plans for the bridge were complete—lend color to plaintiffs' contention that the repeated and public threats by a few Congressional voices did have an impact on the Secretary's decisions. As the District Court pointed out,

> [t]here is no question that the evidence indicates that strong political pressure was applied by certain members of Congress in order to secure approval of the bridge project. Congressman Natcher stated publicly and made no secret of the fact that he would do everything that he could to withhold Congressional appropriations for the District of Columbia rapid transit system, the need for which is universally recognized in the Washington area, until the District complied with the 1968 Act.[*]

When funds for the subway were, in fact, blocked, Representative Natcher

> made his position perfectly clear, stating that "as soon as the freeway project gets under way beyond recall then we will come back to the House and recommend that construction funds for rapid transit be approved."[**]

The author of this opinion is convinced that the impact of this pressure is sufficient, standing alone, to invalidate the Secretary's action. Even if the Secretary had taken every formal step required by every applicable statutory provision, reversal would be required, in my opinion, because extraneous pressure intruded into the calculus of considerations on which

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[*] 316 F. Supp. at 762. The "1968 Act," section 2A of the Federal-Aid Highway Act of 1968, is discussed at pp. 22-23 *infra*.

[**] 316 F. Supp. at 762.

the Secretary's decision was based. Judge Fahy, on the other hand, has concluded that since critical determinations cannot stand irrespective of the allegations of pressure, he finds it unnecessary to decide the case on this independent ground.

In my view, the District Court clearly and unambiguously found as a fact that the pressure exerted by Representative Natcher and others did have an impact on Secretary Volpe's decision to approve the bridge. The Court pointed out that

> [t]he statement issued by the Secretary at the time he directed the Federal Highway Administrator to restore the bridge to the Interstate System indicates that the pressure on the rapid transit funds *was a consideration at that time.*[70]

The Court also found, on the basis of the Secretary's contemporaneous statements and his testimony before the Court, that

> there is no question that the pressure regarding the rapid transit appropriations *was given some consideration* at the time of the approval of the project in August, 1969.[71]

The Secretary's testimony indicated, as the court below pointed out, that "his decision was based on the merits of the project and not *solely* on the extraneous political pressures."[72]

Notwithstanding these findings of fact, the Court determined as a matter of law that since the Secretary was not acting in a judicial or quasi-judical capacity, his decision would be invalid only if based *solely* on these extraneous considerations.[73] I cannot accept that formulation of the applicable legal principle. While

[70] *Id.* at 764–65 (emphasis added).

[71] *Id.* at 766 (emphasis added).

[72] *Id.* at 765–66 (emphasis added).

[73] *Id.* at 765.

Judge Fahy is not entirely convinced that the District Court ultimately found as a fact that the extraneous pressure had influenced the Secretary's decision—a point which is for me clear—he has authorized me to note his concurrence in my discussion of the controlling principle of law: namely, that the decision would be invalid if based in whole or in part on the pressures emanating from Representative Natcher. Judge Fahy agrees, and we therefore hold, that on remand the Secretary must make new determinations based strictly on the merits and completely without regard to any considerations not made relevant by Congress in the applicable statutes.

The District Court was surely correct in concluding that the Secretary's action was not judicial or quasi-judicial,[74] and for that reason we agree that much of the doctrine cited by plaintiffs is inapposite.[75] If he had been acting in such a capacity, plaintiffs could have forcefully argued that the decision was invalid because of the decisionmaker's bias,[76] or because he had received ex parte communications.[77] Well-established principles could have been invoked to support these arguments, and plaintiffs might have prevailed even without showing that the pressure had actually influenced the Secretary's decision.[78] With regard to judicial decisionmaking, whether by court or agency,

[74] *See* Citizens To Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 414–15 (1971).

[75] *See, e.g.*, Pillsbury Co. v. FTC, 354 F.2d 952 (5th Cir. 1966); Jarrett v. Scrivener, 225 F. Supp. 827 (D.D.C. 1964).

[76] *See generally* 2 K. Davis, Administrative Law §§ 12.01 *et seq.* (1958).

[77] *Cf.* Sangamon Valley Television Corp. v. United States, 106 U.S. App. D.C. 30, 269 F.2d 221 (D.C. Cir. 1959).

[78] *See, e.g.*, Pillsbury Co. v. FTC, 354 F.2d 952, 964 (5th Cir. 1966).

the appearance of bias or pressure may be no less objectionable than the reality. But since the Secretary's action was not judicial, that rationale has no application here.

If, on the other hand, the Secretary's action had been purely legislative, we might have agreed with the District Court that his decision could stand in spite of a finding that he had considered extraneous pressures. Beginning with *Fletcher* v. *Peck*,[79] the Supreme Court has maintained that a statute cannot be invalidated merely because the legislature's action was motivated by impermissible considerations (except, perhaps, in special circumstances not applicable here[80]). Indeed, that very principle requires us to reject plaintiffs' argument that the approval of the bridge by the District of Columbia City Council was in some sense invalid. We do not sit in judgment of the motives of the District's legislative body, nor do we have authority to review its decisions. The City Council's action constituted, in our view, the approval of the project required by statute.[81]

Thus, the underlying problem cannot be illuminated by a simplistic effort to force the Secretary's action into a purely judicial or purely legislative mold. His decision was not "judicial" in that he was not required to base it solely on a formal record established at a public hearing. At the same time, it was not purely "legislative" since Congress had already established the boundaries within which his discretion could operate. But even though his action fell between these two

[79] 10 U.S. (6 Cranch.) 87, 129–31 (1810).

[80] *Cf.* Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218, 231 (1964); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960). *But see* Palmer v. Thompson, 403 U.S. 217, 224–25 (1971).

[81] *See* 23 U.S.C. § 103(d) (1970).

conceptual extremes, it is still governed by principles that we had thought elementary and beyond dispute. If, in the course of reaching his decision, Secretary Volpe took into account "considerations that Congress could not have intended to make relevant," [82] his action proceeded from an erroneous premise [83], and his decision cannot stand.[84] The error would be more flag-

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[82] United States *ex rel.* Kaloudis v. Shaughnessy, 180 F. 2d 489, 491 (2d Cir. 1950). *See also* United States *ex rel.* Accardi v. Shaughnessy, 347 U.S. 260 (1954), a case remarkably similar to the one before us. *Cf.* Shaughnessy v. United States *ex rel.* Accardi, 349 U.S. 280 (1955).

[83] *Cf.* Perry v. Perry, 88 U.S. App. D.C. 337, 338, 190 F. 2d 691, 692 (1951).

[84] Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971) ("the court must consider whether the decision was based on a consideration of the *relevant* factors") (emphasis added); Wong Wing Hang v. I. & N.S., 360 F. 2d 715, 719 (2d Cir. 1966), *cited with approval in* Citizens to Preserve Overton Park, Inc. v. Volpe, *supra*, at 416; L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 182 (1965).

See also, SEC v. Chenery Corp., 318 U.S. 80, 87–88, 92–94 (1942), where the Court pointed out, inter alia, that "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made, a judicial judgment cannot be made to do service for an administrative judgment." *Id.* at 88. *Accord*, SEC v. Chenery Corp., 332 U.S. 194, 196 (1947); Sunbeam Television Corp. v. FCC, 100 U.S. App. D.C. 82, 243 F. 2d 26 (1957) (Fahy, J.); Chae-Sik Lee v. Kennedy, 111 U.S. App. D.C. 35, 294 F. 2d 231 (1961).

It might be argued that a remand would be futile here since the agency can only repeat the process it purports already to have undertaken: namely, considering the project solely on its merits. While we agree that a remand would be academic if the agency would inevitably arrive at the same result, NLRB v. Wyman-Gordon Co., 394 U.S. 759, 766–67 n.6 (1969); Friendly, *The "Limited Office" of the Chenery Decision*, 21 AD. L. REV. 1, 5 (1968), it seems entirely possible that the

rant, of course, if the Secretary had based his decision solely on the pressures generated by Representative Natcher. But it should be clear that his action would not be immunized merely because he also considered some relevant factors.[57]

It is plainly not our function to establish the parameters of relevance. Congress has carried out that task in its delegation of authority to the Secretary of Transportation. Nor are we charged with the power to decide where or when bridges should be built. That responsibility has been entrusted by Congress to, among others, the Secretary, who has the expertise and information to make a decision pursuant to the statutory standards. So long as the Secretary applies his expertise to considerations Congress intended to make relevant, he acts within his discretion and our role as a reviewing court is constrained. We do not hold, in other words, that the bridge can never be built. Nor do we know or mean to suggest that the information now available to the Secretary is necessarily insufficient to justify construction of the bridge. We hold only that the Secretary must reach his decision strictly on the merits and in the manner prescribed by statute, without reference to irrelevant or extraneous considerations.

For the purposes of the foregoing discussion, we have assumed that pressures exerted by Congressional

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agency could reach a different result if it could insulate itself from extraneous pressures unrelated to the merits of the question. On remand, the agency will have an opportunity to take steps to achieve the insulation required by statute and long-established principles of administrative law, perhaps by compiling a full-scale administrative record, utilizing fully intra-agency review procedures, and consulting with other agencies and planning groups.

[57] *Cf.* Sunbeam Television Corp. v. FCC, 100 U.S. App. D.C. 82, 243 F. 2d 26 (1957).

advocates of the bridge are irrelevant to the merits of the questions presented to Secretary Volpe. It does not seem possible to make even a colorable argument of relevance except with regard to § 138. But it might be argued that the potential loss of the subway was the type of "unique problem" and cost of "extraordinary magnitude"[86] that the Secretary could properly consider in deciding, pursuant to § 138, that there were no prudent alternatives to the use of parkland for the bridge. The Secretary plainly understood that the price of abandoning, modifying, or even delaying construction of the bridge was the loss of appropriations for the District's subway. He undoubtedly viewed the prospect of that loss with understandable alarm, and may have concluded that the destruction of parkland was inescapable and appropriate in the face of Representative Natcher's clear and enforceable threat. We cannot agree, however, that a determination grounded on that reasoning would satisfy the requirements of § 138.

Neither the section's legislative history nor the Supreme Court's decision in *Overton Park* indicates clearly whether or not this sort of consideration should be deemed relevant. We are persuaded, however, that holding these pressures relevant would effectively emasculate the statutory scheme. The purpose of § 138, in our view, was to preserve parkland by directing the Secretary to reject its use except in the most unusual situation where no alternative would be available. The "unusual situation" posited here is entirely the product of the action of a small group of men with strongly-held views on the desirability of the bridge, who, it may be assumed, are acting with

[86] *See* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 412–13 (1971).

the interests of the public at heart. They may well be correct in concluding that a new bridge is needed and that no alternative location is available. But no matter how sound their reasoning nor how lofty their motives, they cannot usurp the function vested by Act of Congress in the Secretary of Transportation. Until the statute is amended or repealed by another Act of Congress, the Secretary must himself decide, bearing in mind the statute's mandate for the preservation of parkland, whether a prudent alternative is available. Congress could not have contemplated that an alternative would be "imprudent" merely because persons who are convinced that parkland should be used have the power to decree that all alternatives to the use of that parkland shall henceforth be agonizing. Our interpretation of § 138 is essential if the Secretary is to be insulated from extraneous pressures that have no relevance to his assigned statutory task.

To avoid any misconceptions about the nature of our holding, we emphasize that we have not found—nor, for that matter, have we sought—any suggestion of impropriety or illegality in the actions of Representative Natcher and others who strongly advocate the bridge. They are surely entitled to their own views on the need for the Three Sisters Bridge, and we indicate no opinion on their authority to exert pressure on Secretary Volpe. Nor do we mean to suggest that Secretary Volpe acted in bad faith or in deliberate disregard of his statutory responsibilities. He was placed, through the action of others, in an extremely treacherous position. Our holding is designed, if not to extricate him from that position, at least to enhance his ability to obey the statutory command notwithstanding the difficult position in which he was placed.

III.

We conclude that the case should be remanded to the District Court with directions that it return the case to the Secretary[87] for him to perform his statutory function in accordance with this opinion. It seems clear that even though formal administrative findings are not required by statute, the Secretary could best serve the interests of the parties as well as the reviewing court by establishing a full-scale administrative record which might dispel any doubts about the true basis of his action.[88] Accordingly, the District Court is directed to enjoin construction of the bridge until the defendants have complied with the applicable statutory provisions as set forth in our opinion.

Reversed and remanded.

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[87] *Cf. id.* at 419 n.33.

[88] While formal findings are not required by statute, they are compelled by one of the Department's own internal regulations. DOT Order 5610.1, issued on October 7, 1970. *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 417–19 (1971). That Order was not in effect at the time the Secretary's determinations were made. Plaintiffs argue that the Order should be applied retrospectively, and that it should therefore constitute an independent basis for reversal. While the Supreme Court rejected a similar claim in *Overton Park, supra*, that decision may be distinguishable in that a full administrative record was available there to facilitate review. *Id.* at 419. While the proposed distinction would seem to have a good deal of force, we need not reach the question in view of our conclusion that the Secretary failed, irrespective of DOT Order 5610.1, to make the determinations required by statute. When the Secretary makes new determinations on remand, the Order will presumably apply.

Separate opinion by Circuit Judge MacKinnon, concurring in part and dissenting in part

[Referred to in opinion of the Court filed October 12, 1971]

Filed November 4, 1971

MacKINNON, *Circuit Judge*, concurring in part and dissenting in part: From time immemorial the public interest has suffered from various types of bottlenecks which injure the public in many ways. This case arises out of governmental efforts which seek to improve the highway transportation facilities of the Washington Metropolitan area by removing a number of highway bottlenecks. One of these is the traffic bottleneck in the vicinity of, and across the river from, Georgetown in Northwest Washington. There the increasing congestion on parkland highways, an antiquated street system and historic road patterns which are additionally confined within the adverse topographical features of the beginnings of the Potomac Gorge, combine with the necessity of bridging the Potomac River to cause great inconvenience to those attempting to enter or leave the District of Columbia by means of the existing streets and highways. The result is great inconvenience to thousands of highway users entering and leaving the capital and a substantial lengthening of many workers' day.

The governmental authorities responsible for dealing with this situation concluded that it is necessary to erect the Three Sisters Bridge across the Potomac River as one essential part of the overall highway improvement program proposed for the entire metropolitan area. The erection of this bridge is here opposed by a citizens group of the District of Columbia

which does not seriously attack the basic merits of the overall program to improve highway traffic congestion but instead ground their opposition on an alleged failure to comply with certain procedural requirements imposed by statute which are applicable to the planning and construction of the project. In such matters, under our form of government with its separation of powers, the function of policy making is assigned to the Legislative and Executive Branches. Congress enacts the basic laws and these are carried out by (1) the Executive Department functioning principally through the Department of Transportation, headed by the Secretary of Transportation, a member of the President's Cabinet, Mr. Volpe, though other federal departments may perform isolated functions; and (2) by the District of Columbia acting through its Highway Department.

It should also be noted that the Constitution vests Congress with complete control over the entire area of the District of Columbia for all governmental purposes and insofar as legislation is concerned vests it with the combined powers of the federal and state governments. *U.S. Constitution,* art. I, § 8; *Kendall* v. *United States,* 12 Pet. 524, 618 (1838); *Stoutenburgh* v. *Hennick,* 129 U.S. 141, 147 (1889); *Shoemaker* v. *United States,* 147 U.S. 282, 300 (1893); *Atlantic Cleaners and Dyers* v. *United States,* 286 U.S. 424, 434–35 (1932); *O'Donoghue* v. *United States,* 289 U.S. 516, 539 (1933). The Constitution thus imposes a precise duty upon the members of Congress to look after the needs of the District of Columbia in addition to those of their individual district constituents. Members of Congress are also charged with guarding all the interests of the entire nation in the District of Columbia as the seat of our

national government. Pursuant to this assignment of responsibilities, Congress and its members have taken cognizance of the need for transportation facilities in the District of Columbia and the surrounding metropolitan area. To meet the area's anticipated transportation needs it has authorized the appropriation of federal funds for the construction of a metropolitan subway system and has also authorized and directed that substantial additions be constructed to the thru-highways in the area. These additions include the erection of the Three Sisters Bridge.[1] In this connection it was the decision of Congress that the subway construction and the additional highways (including the Three Sisters Bridge) would be built contemporaneously. This conclusion follows from the facts of the contemporaneous appropriations and the express congressional direction that work on the Three Sisters Bridge begin within thirty days after the congressional enactment (82 Stat. 815).

The remainder of this opinion deals with the very extraordinary majority opinion—extraordinary in that it effectively sets aside for one alleged reason or another *every* finding of the trial court that the Government had in any way complied with the statutes in question. In its own language:

> As to the provision with which the District Court found compliance, however, we have concluded that the statutory requirements were not satisfied . . . .

Majority opinion, page 3.

In this terse manner the extensive findings of the trial court are effectively negated. This discussion of

[1] The proposed bridge lies almost completely in the District of Columbia since the Potomac River is entirely within the District. The bridge approaches on the south bank would be within the jurisdiction of Virginia.

the application of the separate statutes (Title 23, U.S. Code) which follows fully demonstrates the wide gulf between the majority and the practical trial judge who heard all the witnesses in an extensive 12-day hearings, received 1,025 pages of depositions and then thoroughly documented his findings in an opinion covering 40 printed pages. *D.C. Federation of Civic Associations v. Volpe*, 316 F. Supp. 754 (D.D.C. 1970).

SECTION 138—FEASIBLE AND PRUDENT ALTERNATIVES AND PLANNING

The majority opinion sets aside the determination of the trial court that the Secretary had complied with the requirements of section 138[2] largely because of an absence of formal findings and an administrative record in the Department of Transportation. The majority opinion asserts that all possible planning to minimize harm to the affected parkland and historic sites[3] could not have been carried out because the

[2] § 138 requires a determination that there was "no feasible and prudent alternative to the use of such land" and that "the project includes all possible planning to minimize harm to such park . . . or historic site." 23 U.S.C. § 138.

[3] *Georgetown as an historic site.* The Old Georgetown District was created within the District of Columbia by Chapter 984, approved September 22, 1950 (64 Stat. 903). Its west boundary was fixed at "Archbold Parkway from Reservoir Road to the Potomac River. . . ." The district so established would be slightly to the east of the presently prescribed location of the Three Sisters Bridge. If any of the ramps or interchanges were to come within said district, it is obvious from the maps that it would only touch a *de minimus* area at the southwest corner of the district which is devoid of buildings. Thus, the Three Sisters Bridge does not imperial the architecture in Georgetown. The Old Georgetown District was established "to preserve and protect places and areas of historic interest, exterior architectural features and examples of the type of architecture used in the National Capital in its initial

final design of the ramps and interchanges had not been completed when the Secretary approved the project. However, the lack of findings and the normal departmental administrative record is fully and satisfactorily explained by the fact that the Secretary personally made the necessary decisions and the Department file thus does not include the usual interoffice memoranda reflecting action by subordinates which is a feature of those projects when the Secretary does not personally exercise his statutory responsibility. After all, the statute places the duty

years. . . ." (64 Stat. 904) To effectuate the intent of Congress the Act required the Commissioners of the District of Columbia before issuing any permit for the construction, alteration, reconstruction or razing of any *building* within the Old Georgetown District, to refer the plans to the National Commission on Fine Arts for a report as to "the exterior architectural features, height, appearance, color and texture of the materials of exterior construction which is subject to public view from a public highway." The Commission was then required to report its recommendations as to whether the plans with respect to any building would preserve the historic value of said district and if not to suggest changes. Thus, while the Act referred to "places and areas" of historic interest, the operative features of the law were directed solely to buildings within the district and there was no showing made in this case that any buildings within the district would be affected by the Three Sisters Bridge or any of the ramps and interchanges that would be constructed under any plan. And as stated above, only a *de minimus* area at the southwest corner might be affected by the ramps and interchanges. The bridge itself would not touch the Old Georgetown District. Also the character of the so-called parkland on the north bank of the Potomac (the D.C. side) where the bridge abutments would be erected consists practically entirely of a railroad right-of-way, the Chesapeake and Ohio Canal and a public highway. Thus, any substantial interference with "green places" on the District of Columbia side of the river has not been demonstrated.

upon the Secretary to make such determinations and his decision should not be set aside because of the absence of documents which are not necessary or normal when he personally exercises that responsibility. This Secretary of Transportation is not a figurehead. He has had extensive prior experience in highway programs. His background and record indicate that he is personally capable of making not only the ultimate decision on the bridge project but also many of the underlying minor, but basic, decisions.[4]

Further, I would not conclude that the Secretary failed to indulge in all possible planning to minimize harm to the park because his consideration of the amount of land to be taken by the ramps was based

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[4] Biographical data on Secretary of Transportation John A. Volpe indicates that he was born December 8, 1908, graduated from high school and following two years of night school majored in architectural construction at Wentworth Institute. He engaged in the construction business in Massachusetts from 1933 to 1943 when he volunteered for duty with the Civil Engineer Corps (Seabees) of the United States Navy. On his return to civilian life he held the rank of Lt. Commander and he then reopened his construction company. As the business grew, he set up offices in Washington, D.C. and Miami, Florida. He served as Commissioner of Public Works for the State of Massachusetts for four years beginning in 1953. In this position he undertook one of the largest highway construction programs in the history of Massachusetts. President Eisenhower named him as the first Federal Highway Administrator of the United States and he served in this position in 1956 and 1957 and thus became one of the architects of the $40 billion Interstate Highway Program initiated by the United States at that time. He is a member and past president of the Society of American Military Engineers and is also past president of the Associated General Contractors of America. He was also elected to three terms as Governor of Massachusetts. CONGRESSIONAL DIRECTORY, 92nd Cong., 1st Sess. 973 (1971).

on the *preliminary plans* for the ramps. In this respect the opinion of the trial court states:

> Secretary Volpe testified that he based his determination on the preliminary planning for the ramps and interchanges which had been done at that time. Although he conceded that the final design of the ramps was not complete, he pointed out that there were *very limited alternatives available*. He stated that before he approved the bridge project, he was satisfied, and the Department of Interior, which had jurisdiction over the parklands, was satisfied, that the designs which would be developed based on the preliminary plans would result in a minimum taking of parkland. [Emphasis added.]

D.C. Federation of Civic Associations v. *Volpe, supra,* 316 F. Supp. at 774–75. I construe this statement of the trial court as a finding that the Secretary took into consideration the amount of park land that might be required under *all* the limited alternatives for the ramps and interchanges. Thus, the final selection of any ramp, etc., design would not present any problem that the Secretary has not already considered.

As to the suggestion of the majority that the use of the word "harm" in the statute confers authority upon the courts in this case, where only Government land is involved, to pass upon the "subtle calculations" inherent in determining the "aesthetic value" of this bridge, it is my view that Congress had more practical considerations in mind and did not thereby direct the rejection of projects, which while they may be "pleasing" to the eye might by some personal standards be considered not to be "beautiful." *See* Webster's New International Dictionary, 2d ed.

The majority opinion further states that the Government can hardly maintain that there was no

"feasible" alternative to the construction of the Three Sisters Bridge because this exemption under *Overton Park*[5] only applies if the Secretary finds that as a matter of "sound engineering" it would not be feasible to build the highway along any other route. To my mind this argument is not foreclosed to the Government in the least. The majority's comment may have been falsely premised on a belief that sound engineering referred only to structural features, but there is much more to highway engineering than the stability of the structural features that may be constructed. Certainly the location of present highways and bridges in the Washington area when combined with various topographical features, existing traffic flow patterns, and the fact that one objective of the Three Sisters Bridge project was doubtlessly intended to alleviate some of the traffic congestion presently existing on the highways within the parklands on both sides of the river in the vicinity of the Three Sisters Bridge, might compel the conclusion that as a mater of sound *highway* engineering the only feasible project that would correct the congestion would be to erect a bridge in the vicinity of the Three Sisters Islands.[6] I would thus not rule out the possibility that sound highway engineering would practically dictate a bridge at that location and that it would not be feasible to correct that traffic congestion by the construction or expansion of a bridge at any other location. The controlling engineering principles when applied to the facts here present may not produce such a conclusion but there

[5] Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971).

[6] The so-called Three Sisters Islands consist of nothing more than three small rocks which project above the waters of the Potomac River. At low tide they are connected by a small sand bar.

is nothing in this record to indicate that such conclusion could not properly be dictated by the application of sound highway engineering principles.

The personal involvement of the Secretary in the decision also explains the alleged failure of the Department to process the matter through normal procedural channels in the Department. When a statute directs a Cabinet officer to make a decision, that decision should not be criticized or found to be faulty because he did not delegate the groundwork to subordinates and then rubber stamp their decision.

The majority opinion also states that

> Secretary Volpe did not consult with other planning agencies to coordinate efforts to minimize harm to the park and historic sites.

Majority opinion, page 11. This statement refers to something that is not required by the statute. It seems clear that the provision of section 138 requiring "all possible planning to minimize harm to such park . . . or historic site from such use"[7] does not require that the Secretary of Transportation "*consult* with other planning agencies to coordinate efforts to minimize harm to the park and historic sites."[8] (Emphasis added). The majority opinion while it does not state so exactly, seems to be trying, by such language, to give the National Capital Planning Commission a voice in the Secretary decision by compelling the Secretary to "consult" with them. But the statute does not so provide. It requires only that the Secretary engage in all possible *planning* and not that he consult every group that may have an axe to grind—he *may* consult with such groups but there is no requirement that he do more than indulge in "all

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[7] 23 U.S.C. § 138.

[8] Majority opinion, p. 11.

possible planning." Clearly consulting is something more than planning. The statute directs the Secretary to make the decision and he is not forced to share that decision with outside agencies under the guise of consulting. The statutory requirements are already cumbersome enough without having the majority try to invent new requirements.

As for air pollution, I find the trial court's finding that "air pollution was an overall consideration in this as well as all interstate highway projects"[9] to completely satisfy any requirement in this respect. Moreover, it seems obvious to me that the bridge would not *create* any air pollution, and that to the extent that it relieved highway congestion on the present highways in the parks it would *decrease* air pollution. In this respect, as in other instances, appellants and the majority are straining at gnats. Instead of sustaining appellants' vague generalized objections to the present plans, I would require the objectors to show precisely how some of the plans being considered by the Secretary failed to meet the statutory standard or that some other feasible plan would cause less harm.

It also seems to me that, in requiring approval by the Secretary of final engineering plans for all details before the project can proceed, the majority are giving an overly technical, legalistic and impractical interpretation to the statute. What the Act requires is that the Secretary "not approve any *program* or *project* . . . unless there is no feasible and prudent alternative . . . and all possible *planning* to minimize harm . . . ." was indulged in. To my way of thinking this would permit the Secretary to approve a program or project which is described by general specifications

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[9] D.C. Federation of Civic Associations v. Volpe, 316 F. Supp. 754, 775 (D.D.C. 1970).

and reasonably precise locations without having the final blueprints. Certainly as a practical matter there must be room for some preliminary approval prior to the preparation of blueprints because no government is going to spend the millions of dollars necessary to prepare the final drawings without some prior approval that the drawings are being prepared along lines acceptable to the approving authority. If it subsequently develops that the final plans for some phase of the project do not meet the statutory standards they may be attacked at that time. Alternatively, the preliminary plans could be attacked upon a showing that they did not meet statutory standards. But there is neither such showing here and I would not hold up projects, as the majority holds up this project, unless the objectors could demonstrate that substantial harm would result from the presently existing plans which would be alleviated by some other plan. Insofar as this affects the possible ramps and interchanges here it would be a relatively simple matter to consider all the "limited alternatives" and make a decision thereon. I would thus not remand for any purpose connected with section 138.

Section 134—Comprehensive Transportation Planning Process

This section requires the Secretary to cooperate with the states and not approve highway projects unless he finds them to be based on a continuing comprehensive transportation planning process carried on cooperatively by "states and local communities."[10]

In considering the requirements of this section the majority reverse the trial court by concluding that the Public Roads Division Engineer (Mr. Hall), to

[10] 23 U.S.C. § 134.

whom the Secretary delegated his responsibility under section 134, had improperly in turn delegated his responsibility to the Transportation Planning Board (TPB) of the Metropolitan Washington Council of Governments (COG), because, they allege, Mr. Hall believed that "TPB was the primary agency to which he should look in making his findings." But certainly the belief that TPB was "the primary agency" for such purposes does not constitute a delegation of his authority. The record thus does not support the majority's finding of improperly delegated authority.

Moreover, the TPB was the *only* agency in the area that did satisfy the requirement of the statute of a body carrying on a "continuing comprehensive transportation planning *process* * * * *cooperatively by states and local communities* * * *." Also, as the trial court noted, the District of Columbia, through resolution of its Board of Commissioners on June 17, 1965, provided for the District's participation in the planning processes carried on by TPB.

What is really involved in the majority's opinion in this respect, as with its criticism under section 138 that Secretary Volpe did not *consult* with other planning agencies, is another backhand attempt to elevate the National Capital Planning Commission (NCPC) to a point where it can obstruct the project for its own ends. However, the NCPC is "concerned with planning *solely* for the District of Columbia," and thus does not meet the requirement of the statute for a planning organization being carried on "cooperatively by states and local communities." In contrast, the TPB is a regional organization [11] and does satisfy the statute. It is thus my conclusion that the majority

[11] D.C. Federation of Civic Associations v. Volpe, *supra* note 9, 316 F. Supp. at 795.

exceeded its authority on this appeal when it ruled, contrary to the facts, that Mr. Hall had delegated his authority. Similarly, the majority are acting contrary to the statute, if they are attempting to compel the Secretary to be governed by the views of the NCPC. I might add that the situation here is not novel in the United States. Comprehensive highway plans traditionally run into many local objections, some selfish and some meritorious. When such situations arise they can only be solved by a fair application of the law, which I do not consider here justifies the majority in indirectly suggesting an interpretation of the statute that would give appellants, through the narrow interests of the NCPC, a whip hand in the final decision.

A further example of the tenuous rationale of the majority in its reversal appears in its attempted characterization of the TPB approval of the Three Sisters Bridge as a "stale" approval.[12] The TPB formally approved the Three Sisters Bridge in December 1967 as "consistent with comprehensive planning in the region" and since that time, as the District Court found, "the TPB has continuously reviewed the transportation system for the area and * * * the approval of the Three Sisters Bridge has never been rescinded."[13] The Division Engineer of the Bureau of Public Roads (Mr. Hall) considered this approval of the bridge when he made his finding in August or September, 1969, that the project was "based on a continuing comprehensive transportation planning process carried on cooperatively by states and local communities."[14] On these admitted facts,

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[12] See page 15 of majority opinion.

[13] 316 F. Supp. at 794.

[14] *Id.*

I consider it to be a gross distortion of the record to characterize Mr. Hall as acting upon a "stale" approval, when the original TPB approval was within twenty months, and the area transportation system had been "continuously reviewed" by the TPB since then without any alteration in its approval of the bridge. It is also incorrect to call such approval "inapposite." And to require a "comprehensive *plan*" (which the court refers to, whatever that might mean as applied to a project for a single bridge), as opposed to requiring that project to be consistent with "comprehensive *planning*," is to attempt to impose a requirement that is not imposed by the statute.[15]

I thus concur in the trial court's finding that the requirements of section 134 were fully complied with and dissent from the contrary conclusion of the majority here.

SECTION 109(a)—THE SAFETY OF THE PROJECT

I concur in the trial court's conclusion to require further study of the structural feasibility of the bridge but dissent from that portion of the majority opinion which states that the Secretary "undertook no study of the [air pollution] problem." As previously stated the Secretary testified that "air pollution was an overall consideration *in this* as well as all interstate highway projects"[16]: thus I consider that the air pollution problem was properly considered and disposed of. I would further permit work to proceed upon the *excavation* for the piers because this work is in the nature of a preliminary test since preconstruction borings are not conclusive. Thus, according to the testimony there will always be some doubt

[15] 23 U.S.C. § 134.

[16] 316 F. Supp. at 775.

as to the absolute feasibility of the location and plans until the excavation is completed for the piers. It is my view that given the approval of Congress, and the necessary available appropriations (both of which the project has), it is within the proper discretion of the Secretary to proceed to that extent.

Section 128—The Location Hearing

Since the record is devoid of any proof that the present location of the bridge and ramps would affect the public in any manner substantially different from the three locations (which spread eagled the present location) discussed at the 1964 hearing, I would concur in the findings of the trial court that the public hearing requirements were substantially complied with. I thus dissent from the statement by the majority that the trial court's opinion was not clear that a finding had actually been made. To me it is perfectly clear that the court so found when it ruled that the present location was "not a new location" within the meaning of section 6a(1) of the PPM. The finding by the trial court that "no private property will be taken for the bridge or its ramps and interchanges" is also relevant to the finding with respect to the location.

Section 317—The Map

This section requires that a map should be filed showing the portions of land which a department desires to appropriate. In this connection the majority opinion in footnote 61 refers to a letter of December 15, 1970 from the National Park Service and indicates that the plaintiffs may present this matter to the District Court for reconsideration of its ruling under Section 317. It seems clear, however, that the letter does not relate to any parkland but only to the

"adverse impact (of traffic conditions) on the parkway (the highway)." It is thus my opinion that the letter would not have any relevance to any issue under section 317.

CONGRESS, REPRESENTATIVE NATCHER AND SO-CALLED POLITICAL INFLUENCE

In Part II of the majority opinion Judge Bazelon deals with the position of Congress and refers principally to some statements by Representative Natcher relating to the Three Sisters Bridge. The opinion infers that Representative Natcher by his acts was a party to forcing approval of the Three Sisters Bridge without regard to its merits, but the record does not so reflect. As the trial court found, Representative Natcher stated that he would do what he could to withhold appropriations for the construction of the District of Columbia rapid transit system "until the District complied with the 1968 Act" and "the freeway project gets under way beyond recall."[17] Representative Natcher was thus merely attempting to see that the laws enacted by Congress were carried out. The Three Sisters Bridge was just one of several freeway projects upon which Congress in 1968 had directed the District of Columbia to commence work.[18] It is not unusual or improper for Congress to withhold appropriations until its laws are complied with. In discussing the public position of Congress, as articulated by its laws and Representative Natcher, Judge Bazelon states:

> [T]he impact of this [congressional] pressure is sufficient, standing alone, to invalidate the Secretary's action. Even if the Secretary had

[17] *Id.* at 762.

[18] Pub. L. No. 90-495, 82 Stat. 815 (1968).

> taken every formal step required by every applicable statutory provision, reversal would be required, in my opinion, because extraneous pressure intruded into the calculus of considerations on which the Secretary's decision was based. (Majority opinion, p. 24)

And further:

> [T]he [trial] court determined as a matter of law that since the Secretary was not acting in a judicial or quasi-judicial capacity, his decision would be invalid only if based *solely* on these extraneous considerations [the influence emanating from Representative Natcher]. (Majority opinion, p. 25)

Judge Fahy does not agree that the trial court found that extraneous pressure had influenced the Secretary's decision and I find it impossible to read the findings and conclusions of the District Court as announcing that holding. In this respect the trial court's opinion states:

> The mere fact that the Secretary was aware of the Congressional pressure to build the Three Sisters Bridge is not sufficient to invalidate his action in directing that the bridge be restored to the Interstate System. Since the issue in this suit is whether there has been compliance with Title 23 of the United States Code, *the political pressure exerted by members of Congress is relevant only as to whether it may have caused Secretary Volpe to act without considering the merits of the project as required by Title 23.* As will be discussed in connection with § 138, Mr. Volpe commenced an exhaustive study of the merits of the Three Sisters Bridge project soon after taking office, and did not come to a decision that the bridge was essential until the Summer of 1969. *The Court believes the Secretary's testimony that his decision was based on the merits of the project and not solely on ex-*

trancous political pressures. It is true that Mr. Volpe was also interested in securing the release of the rapid transit appropriations, and that the approval of the bridge led to the release of those funds. *But the Court finds that the mere fact that the Secretary was aware of this pressure does not invalidate his decision that the Three Sisters Bridge is an important and necessary part of the Interstate Highway System.*

* * * * *

The plaintiffs contend that the Congressional pressure for the construction of the Three Sisters Bridge was of such a character that it can reasonably be inferred that it had *some influence*, conscious or unconscious, on the decision of the Secretary to redesignate the bridge as part of the Interstate System. From the evidence of the contemporaneous statements of Secretary Volpe, and his testimony in this case, there is no question that the pressure regarding the rapid transit appropriations was given some consideration at the time of the approval of the project in August, 1969. But the Court concludes that this does not invalidate the decision of the Secretary in this case . . . . The statute commits the decision to the Secretary's discretion. There is no requirement that he base his decision only on matters presented at a public hearing, but rather, *there is only the implied requirement that he base his decision on the merits of the project. In view of the Secretary's testimony that he made an exhaustive review of the merits of the project and based his decision on that study, this Court will not invalidate his decision.* The present case is further distinguishable from *Jarrott* in that there the contacts with the Board were secret, while here the actions of Congressman Natcher and others are a matter of public record contained in official Congressional docu-

> ments and speeches made on the floor of the House of Representatives. [Footnote omitted, emphasis added.]

D.C. Federation of Civic Associations v. Volpe, 316 F. Supp. 754, 765–766–767 (D.D.C. 1970).

It is submitted that any fair reading of the trial court's opinion cannot twist its language to support Judge Bazelon's conclusion that it held that the Secretary's decision would be invalid "*only* if based *solely* on these extraneous considerations." While the trial court found as a fact that the Secretary's decision was "based on the merits of the project and not solely on extraneous political pressures," this is only one of several fact findings; it is not the basis for the decision of the trial court and such factual finding is not the application of any rule of law. The trial court also found that "the mere fact that the Secretary was aware of this [congressional] pressure does not invalidate his decision * * *." But most importantly, the controlling conclusions by the trial court recognized the "implied requirement that he [the Secretary] base his decision on the merits of the project" and that the Secretary had

> made an exhaustive review of the merits of the project *and based his decision on that study*, [and] this Court will not invalidate his decision. (Emphasis added).

It thus seems clear to me that the trial court (Chief Judge Sirica) thereby found that the Secretary had based his decision upon the merits of the project. I specifically concur in this conclusion of the trial court and disagree with Judge Bazelon's solitary conclusion with respect to this phase of the case. Judge Fahy also does not agree with Judge Bazelon that the trial court found that extraneous pressure had influenced the Secretary's decision. It is thus clear

that as presently articulated in these opinions a majority of the judges on this panel do not require that new determinations "on the merits" be made because of the interjection of any, for want of a better name, political pressure.

Judge Bazelon's opinion also discusses the *relevance* of the position of Congress on the appropriations to the matter of the Three Sisters Bridge. Under *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971), the Supreme Court indicated that "The court must consider whether the decision [on the use of parklands] was based on a consideration of the relevant factors." I find that the trial court made the proper finding when it determined after a lengthy trial that the Secretary based his decision on a "review of the merits of the project * * * [and] * * * that study." While the majority opinion states it is not holding that the bridge can never be built, if Judge Bazelon's individual view as to the position of Congress in this and other matters were to prevail, the result would come close to setting up legalistic standards which are practically impossible of compliance. Judge Bazelon's opinion would do that here by deciding, contrary to the finding of the trial judge, that because a member of the Cabinet had *knowledge* of the position of Congress on appropriations for subways and highways in the District of Columbia that his decision with respect to the merits of a highway project must necessarily have been improperly influenced by that information.

Actually any member of the Cabinet, worthy of his position would necessarily know the position of Congress on such matters. No person with the position and ability to make the decision with respect to the Three Sisters Bridge would be ignorant of the

publicly expressed congressional position on such matters. What Judge Bazelon fails to consider, is that there were congressional pressures both ways and that the trial judge after full consideration found as a fact that the Secretary based his decision on a study of the merits of the project. For an appellate court to reverse such conclusion on this appeal is to overstep its authority to determine whether the action of the Secretary was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The Supreme Court has said that this court has no authority to set aside the Secretary's action on a finding that it was "not supported by substantial evidence" or "unwarranted by the facts." *Citizens to Preserve Overton Park v. Volpe, supra,* 401 U.S. at 114. Likewise, the credibility of witnesses is a matter in which the trial judge is normally considered to have a particular province in actions tried upon the facts without a jury. FED. R. CIV. P. 52(a).[19] Judge Bazelon's

[19] FED. R. CIV. P. 52(a) provides:

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

view of the matter would violate both of these rules.

Judge Bazelon also reflects an overly suspicious view with respect to the effect of so-called political pressures. An individual's attitude toward this type of question is closely related to his individual trust in human beings—whether he believes a human being can resist improper pressures. I do not find it unusual for a Cabinet member to be capable of resisting such pressures. Moreover the law is that in the absence of evidence to the contrary (and there is no such evidence here) public officers are to be presumed to perform official acts in accordance with the law.[20] As I read Judge Bazelon's opinion; however, it is his individual view that such pressures are irresistible. In the face of such colossal distrust of Government officials, the mere existence of the vestiges of pressure becomes equivalent to the reality of duress. I find that conclusion to be unsupportable—and contrary to law.

The realities of this situation are that under the Constitution the Congress of the United States has a wider voice in the affairs of the District of Columbia than it does in the affairs of states or other cities. Pursuant to its constitutional mandate Congress does take a firm hand in matters affecting the District and that is precisely what this court found was lacking in the first case (1968) involving the District highway pro-

[20] United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926) states:

> The presumption of regularity supports the official acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their officials duties. *Confiscation Cases*, 20 Wall. 92, 108; *United States* v. *Page*, 137 U.S. 673, 678-680; *United States* v. *Nye*, 189 U.S. 199, 205.

Oestereich v. Selective Service Bd. No. 11, 393 U.S. 233, 241 (1968) (Harlan, concurring), is to the same effect.

gram. *D.C. Federation of Civic Associations, Inc.* v. *Airis*, 129 U.S.App.D.C. 125, 391 F.2d 478 (1968). But no Congressman has any weight in such matters beyond his ability to speak for Congress and to the extent that he does speak for Congress he is only calling attention to the expressed will of Congress.

Congress has spoken in this matter. In Section 23 of the Highway Act of 1968 [21] it ordered the erection of

[21] § 23 of the Federal-Aid Highway Act of 1968 provides:

SEC. 23. (a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate", printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section C1 to C4), terminating at Bladensburg Road.

(c) The government of the District of Columbia and the Secretary of Transportation shall study those projects on the Interstate System set forth in "The 1968 Interstate

the Three Sisters Bridge, not as a single project but as part of the broad highway improvement program for the Washington Metropolitan area. And Congress and those who speak for it have a continuing interest in seeing that the expressed will of Congress, as clearly enunciated in a statute signed by the President, be carried out.

Moreover, Congress has also declared that the relationship of the highway improvement program in any state or the District of Columbia, be coordinated with plans for improvements in other affected forms of transportation (this would include subways) which are formulated with due consideration to their public effect on the future development of large urban areas. In this respect Title 23, § 134, provides as follows:

> § 134. Transportation planning in certain urban areas
>
> *It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively.* To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in *the development of long-range highway plans and programs which are properly coordinated with plans for im-*

System Cost Estimate", House Document Numbered 199, Ninetieth Congress, within the District of Columbia which are not specified in subsection (b) and shall report to Congress not later than 18 months after the date of enactment of this section their recommendations with respect to such projects including any recommended alternative routes or plans, and if no such recommendations are submitted within such 18-month period then the Secretary of Transportation and the government of the District of Columbia shall construct such routes, as soon as possible thereafter, as required by subsection (a) of this section. (82 Stat. 827-8)

> *provisions in other affected forms of transportation* and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing *comprehensive* transportation planning process carried on cooperatively by States and local communities *in conformance with the objectives stated in this section*. Added Pub. L. 87-866, § 9(a), Oct. 23, 1962, 76 Stat. 1148. (Emphasis added).

Thus, this congressional mandate applies to both the subway and to the highway program for the Washington Metropolitan area with which we are here concerned. To the extent that it provides that the Secretary shall not approve highway projects in large urban areas unless he finds such projects are based on a continuing *comprehensive* (*i.e.*, rail and highways) transportation planning process in conformance with the objectives stated in Section 134, it is essential that the Secretary of Transportation in approving highway plans be concerned with the program to build subways in the District of Columbia. Indeed it would be impossible and contrary to law for any Secretary of Transportation to pass on any major highway project in the District of Columbia without being familiar with and considering its effect and relationship to the subway construction program. In carrying out this statutory duty the Secretary must determine, in this case with respect to the District of Columbia, that the proposed subway and highway plans will *combine* to produce "modes of transportation in a manner that will serve the States and local communities [here the

Washington Metropolitan Area] efficiently and effectively." It is obvious, if the subway program were to proceed without the necessary highway construction, that the modes of transportation being built would not be efficient or effective. To this extent some joint consideration of subway and highway construction (including the Three Sisters Bridge) was a relevant matter and I do not find that the Secretary exceeded his authority by giving such matters more weight or consideration than was required by the statute.

In its discussion of "prudent alternatives" the majority opinion really attempts to define the problem as being one to determine whether a unique problem of extraordinary magnitude was posed by the potential loss of appropriations for the District subway. This is completely foreign to what section 138 is all about and does nothing more than indicate a preoccupation with the position of Congress. Actually when section 138 speaks of prudent alternatives it refers to alternatives to the use of parkland for the erection of the bridge at one location or another. The majority generally ignore the fact that the topographical features of the river with the high, steep banks of the Potomac Gorge, when coupled with the existing highways and parklands on both sides of the river, would cause the location of any other bridge that would meet the traffic congestion problem to affect existing parklands in a substantially similar manner to the Three Sisters project. The case is unique in those respects. It is obvious that the viable alternatives would affect parklands substantially to the same extent.

The majority also ignore the fact that the so-called parklands involved on the Virginia side of the river are all in the George Washington Memorial *Parkway*. Highways have always been an important part of this highway park. The George Washington Memorial

Parkway was established by Congress (46 Stat. 482 *et seq.*) as a narrow elongated parkway along both banks of the Potomac River from Mt. Vernon and Fort Washington to the Great Falls of the Potomac. It parallels the Potomac River from Mt. Vernon to a point above the Great Falls on the Virginia side, except for the City of Alexandria, and from Fort Washington (in Maryland across from Mt. Vernon) to a similar point above the Great Falls on the Maryland side, except within the District of Columbia. One of the congressional purposes, in establishing the parkway as a memorial was to provide for the construction of extensive highways within the dedicated area. The legislation also sought to protect and preserve the natural scenery of the Potomac Gorge and the Great Falls of the Potomac, to preserve the historic Patowmack Canal and to acquire that portion of the Chesapeake and Ohio Canal below Point of Rocks (46 Stat. 482–83).

The fact that this park has to a substantial extent, and always has had extensive highways within its confines, makes it practically impossible for any proposed bridge in this area to be erected without affecting some of its lands. This results from the fact that much of the traffic congestion which the proposed bridge seeks to relieve is traffic over the automobile highways within the parkway itself.

It is thus submitted that (1) the restrictive alternatives occasioned by the topography and location of the parklands, and (2) the nature of the parkland here involved, established by congressional legislation with substantial highways within its confines as one of its principal purposes, make the proposed Three Sisters Bridge a unique problem. It should also be noted that this highway park was established by Congress

and the Congress has power by a subsequent act to change it.

In its peroration to Part II the majority opinion attempts to disclaim certain obvious implications of its decision. However, in so doing, it merely emphasizes the partial and slanted view it takes of the facts. Thus it states they are not suggesting any impropriety in the acts of those who "strongly advocate the bridge"; then next imply that there is some question as to the authority of such persons to exert pressure on Secretary Volpe which resulted in placing the Secretary in such an extremely treacherous position; and then conclude by denying that they are suggesting that Secretary Volpe acted in bad faith or in deliberate disregard of his statutory responsibility. Finally, they set aside the Secretary's finding on grounds which the Secretary testified under oath did not exist and the finding of the trial court supported the Secretary's finding. The result reached by the majority opinion thus contradicts its disclaimers. So whether the majority are implying that the Secretary acted contrary to his statutory responsibilities or not, they end up at exactly the same place as though he had.

However, all of this buys time for the objectors and keeps alive the hope that a new Secretary or a new Council will succumb to pressure and disapprove the project. The majority opinion does not criticize pressure from the objectors and it does not fully state the history of the prior approvals and disapprovals of the project. Originally the Three Sisters Bridge was designated as part of the entire metropolitan freeway project. Nothing in this record indicates that this was not a decision on the engineering merits uninfluenced by any improper pressures. However, in the waning days of an outgoing Presidential Administration, a lame duck City Council of the District of Columbia on

January 17, 1969, three days before a new administration was to take office, deleted the bridge from the Interstate Highway System at the request of the District government. The majority do not question the basis of this action, but only attack the reversal of this decision.[22] It may well be that they should question the background of that decision rather than what may well have been a rectification of a prior error or improper action.

PROCEDURE ON REMAND

In the conclusory paragraph of its opinion the majority suggests that the Secretary establish a "*full scale* administrative record which might dispel any doubts about the *true* basis of his action." When members of an appellate panel, for no reason more substantial than their own innate suspicion, elect to disbelieve the sworn testimony of a member of the Cabinet that his final decision was not influenced by outside factors, and also to circumvent the factual finding of the trial court to the same effect, in my opinion, it is not likely that a more extensive administrative record would cause them to believe him in the future. A court that has gone to the great extremes that this court has to reverse the trial court here can always find reasons satisfactory to it for avoiding practically any subjective decision required with respect to the bridge. It may well be that the only hope to carry out the expressed will of Congress lies with the Supreme Court.

To the extent that the majority opinion differs from the views hereinbefore set forth, I respectfully dissent and I concur in the remainder.

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[22] If the present objectors were associated with the disapproval of the Three Sisters Bridge project in 1969 for reasons unrelated to its merits, it may be that they do not come into court with clean hands.

APPENDIX B

United States Court of Appeals for the District of Columbia Circuit

No. 24838

Civil Action 2821-69.

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL., APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORATION, ET AL.

No. 24843

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.

WALTER J. HICKEL, SECRETARY OF INTERIOR, ET AL., APPELLANTS

SEPTEMBER TERM, 1971

Appeals from the United States District Court for the District of Columbia

Before: BAZELON, Chief Judge, FAHY, Senior Circuit Judge, and MACKINNON, Circuit Judge *

Judgment

These cases came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration thereof, it is

*Circuit Judge MacKinnon dissents, but in the interests of expediting this matter consents to the immediate release of the majority opinion and reserves his right to file a dissenting opinion.

ORDERED AND ADJUDGED by this Court that the judgment of the District Court appealed from herein is hereby affirmed in part and reversed in part, and the cases are hereby remanded to the District Court with directions that it return the case to the Secretary of Transportation for him to act in accordance with the opinion of this Court filed herein this date.

The District Court is further directed to enjoin construction of the bridge until the Secretary has complied with the applicable statutory provisions as set forth in the opinion of this Court filed herein this date.

Per Curiam For the Court:

NATHAN J. PAULSON,
Clerk.

Dated: October 12, 1971.
Opinion by Chief Judge Bazelon.

APPENDIX C

United States Court of Appeals for the District of Columbia Circuit

No. 24838

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL., APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

No. 24843

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.

WALTER J. HICKEL, SECRETARY OF INTERIOR, ET AL., APPELLANTS

September Term, 1971

Before: BAZELON, Chief Judge; FAHY, Senior Circuit Judge and MACKINNON, Circuit Judge

Order

On consideration of appellees' petition for rehearing, it is

ORDERED by the Court that appellees' aforesaid petition is denied.

Per Curiam:

The members of the Court reserve the right to file a statement of their views at a later date.

Circuit Judge MacKinnon would grant the petition for rehearing.

APPENDIX D

United States Court of Appeals for the District of Columbia Circuit

No. 24838

Civil Action 2821-69

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL., APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

No. 24843

D.C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.

WALTER J. HICKEL, SECRETARY OF INTERIOR, ET AL., APPELLANTS

September Term, 1971

Before: BAZELON, Chief Judge; WRIGHT, MCGOWAN, TAMM, LEVENTHAL, ROBINSON, MACKINNON, ROBB and WILKEY, Circuit Judges

Order

On consideration of appellees' suggestion for rehearing *en banc* and there not being a majority of the Judges in regular active service in favor of having this case reheard *en banc*, it is

ORDERED by the Court *en banc* that appellees' suggestion for rehearing *en banc* is denied.

Per Curiam:

Circuit Judges Leventhal and Robb did not participate in the consideration or determination of the suggestion for rehearing *en banc*.

Circuit Judges Tamm, MacKinnon and Wilkey vote to grant rehearing *en banc*.

APPENDIX E

United States District Court,
District of Columbia.

August 3, 1970.

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., ET AL., PLAINTIFFS,

v.

JOHN A. VOLPE ET AL., DEFENDANTS.
Civ. A. No. 2821-69.

Opinion

SIRICA, *District Judge:* In this action several citizens associations and individual citizens and property owners of the District of Columbia challenge the procedures employed by the District of Columbia and the Department of Transportation in the planning and the commencement of construction of the Three Sisters Bridge project.[1]

[1] In their complaint, the plaintiffs defined the scope of the "project" that they are challenging to be not only the bridge structure from shore to shore, but also "related highways and highway structures." The defendants at several junctures in the trial argued that the issue before the Court was limited to the bridge itself from shore to shore. The Court rejects this argument. A reasonable definition of the project challenged in this case must include not only the shore to shore span, but also the ramps and interchanges which will move traffic from the bridge to other highways or streets. Both Secretary Volpe (Tr. 736-37) and Federal Highway Administrator Turner (Tr. 975-76) testified that the ramps and interchanges must be considered part of the bridge project.

The Bridge from the Spout Run area of Virginia to the District of Columbia upstream from Key Bridge is presently in the preliminary stages of construction as part of the Interstate Highway System and is designated as part of route I-266. The Interstate Highway System was created by the Congress to provide a plan of federal-state cooperation in the construction of highways so as to insure "the prompt and early completion of the National System of Interstate and Defense Highways."[2] The statute provides that the federal government shall bear 90% of the total cost of any interstate project with the state involved paying the remaining 10%.[3] The routes of the system are first selected by the state involved (for the purposes of the Act the District of Columbia is designated a state), subject to the approval of the Secretary of Transportation.[4] But the statute is very clear that no federal payment will be made unless the project is designated as part of the Interstate System with the approval of the Secretary.[5] Title 23 of the United States Code establishes a series of requirements which govern the planning and construction of all Interstate Highway projects. The plaintiffs allege in their complaint that the actions of the District of Columbia and the federal government in going forward with this project violate certain provisions of Title 23 of the United States Code, Title 7 of the District of Columbia Code and various other statutory provisions.

The advisability of this project has been a matter of long standing controversy in this community, and a brief summary of the background of this controversy is helpful in setting the present stage of this litigation

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[2] 23 U.S.C. § 101(b) (1964).
[3] 23 U.S.C. § 120(c) (1964).
[4] 23 U.S.C. § 103(d) (1964).
[5] 23 U.S.C. § 103(e) (1964).

in its proper context. During the 1950's and early 1960's several studies of the need for another Central Potomac crossing and the possible alternative types and locations of such a crossing were made. The crossing was first designated a part of the Interstate System in 1960. After holding public hearings on the proposed crossing in 1964, the District of Columbia, with the approval of the federal government, proceeded with the planning for the bridge project in 1966 and 1967. At that time suit was brought by several of the same plaintiffs who appear in this action to enjoin the construction of the bridge and several other freeway projects in the District of Columbia. The Court of Appeals, in a decision dated February 15, 1968, reversed the decision of Judge Holtzoff of this Court, and held that the construction of the projects should be enjoined on the ground that the District of Columbia was proceeding without complying with the procedural requirements of Title 7 of the D.C. Code.[2] Soon thereafter in August, 1968, Congress enacted Section 23 of the Federal-Aid Highway Act of 1968,[3] the pertinent part of which provides as follows:

> (a) Notwithstanding any other provision of law or any court decision or administrative action to the contrary, the Secretary of Transportation and the Government of the District of Columbia shall, * * * construct all routes on the Interstate System * * *. Such construction shall be undertaken as soon as possible after the enactment of this Act, except as otherwise provided in this section and shall be carried out in accordance with all applicable provisions of Title 23 of the United States Code.

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[2] D.C. Federation of Civic Associations, Inc. v. Airis, 129 U.S.App.D.C. 125, 391 F.2d 478 (1968).

[3] Pub.L. No. 90-495, 82 Stat. 815 (1968) [hereinafter referred to as the 1968 Act].

> (b) Not later than 30 days after the date of enactment * * * the government of the District of Columbia shall commence work on the following projects:
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> (1) Three Sisters Bridge * * *.
>
> (2) Potomac River Freeway * * *.
>
> (3) Center Leg of the Inner Loop * * *.
>
> (4) East Leg of the Inner Loop * * *.

This expression of the will of Congress, rather than settling the dispute, served only to exacerbate the controversy. President Johnson, at the time he signed the legislation indicated that he opposed Section 23, but was signing the bill upon the advice of his advisors that prior to construction, compliance with all of the procedural prerequisites would be required.[*] President Johnson also directed at that time that a comprehensive transportation plan be developed for the District of Columbia. In December, 1968, the National Capital Planning Commission (NCPC), the official planning body for the District of Columbia, adopted a comprehensive transportation plan which did not include the Three Sisters Bridge. The District of Columbia City Council approved this NCPC plan, and on January 17, 1969, three days before the new administration was to take office, the bridge was deleted from the Interstate Highway System by the Federal Highway Administrator at the request of the District of Columbia government.

These actions led to what may best be described as the District of Columbia rapid transit-freeway impasse. The Congress, and principally Congressman Natcher, the Chairman of the Subcommittee on the District of Columbia of the House Appropriations Committee, was intent on seeing that the construction mandate in the 1968 Act was carried out. To that

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[*] See Statement of President Johnson, August 23, 1968, 114 Cong. Rec. 30958–30959 (1968).

end, Congressman Natcher threatened to delete the appropriations for the planned metropolitan area rapid transit system from the District of Columbia budget unless construction and/or planning was commenced in compliance with § 23 of the 1968 Act. The District of Columbia government, on the other hand, was determined that no freeway be constructed in the city other than in accordance with the NCPC comprehensive plan. Soon after entering office, the new Secretary of Transportation, Mr. Volpe, undertook to try to resolve the impasse.

On August 9, 1969, the District of Columbia City Council yielded to mounting pressure from Congress and voted to comply with the 1968 Act, which included going forward with the construction of the Three Sisters Bridge. Secretary Volpe, on August 12, 1969, issued a press release to the effect that he was directing the Federal Highway Administrator to rescind the prior deletion of the bridge from the Interstate System. On August 13, 1969, the project was redesignated as part of the Interstate System by the Federal Highway Administrator. In September, 1969, the District of Columbia advertised for bids for the construction of the piers for the bridge, awarded a contract, and work on the project was commenced. Also in September, 1969, Congressman Natcher agreed to the release of the rapid transit appropriations.

This suit was filed on October 3, 1969. The plaintiffs sought a preliminary injunction against any further work on the project until the District of Columbia government and the Department of Transportation had complied with the provisions of Title 23 of the United States Code, Title 7 of the District of Columbia Code, and various other statutes. After a hearing, this Court denied the request for a preliminary injunction. An appeal was taken, but by an order dated

October 31, 1969, the Court of Appeals denied the requested relief without prejudice and remanded the case to this Court for an expedited hearing on the merits. Cross-motions for summary judgment were filed, and this Court on January 12, 1970, after a hearing, granted the motions of the federal and District of Columbia defendants.[9] This Court interpreted § 23 of the 1968 Act as a directive from Congress that the enumerated projects should go forward as soon as possible without the need to comply with the normal planning and procedural prerequisites for Interstate Highway projects.

The Court of Appeals, in an opinion dated April 6, 1970, reversed this ruling.[10] The panel majority disagreed with this Court's statutory interpretation. They held that it was not the intent of Congress to exempt the bridge and the other projects enumerated in the 1968 Act from the hearing and planning requirements of Title 23 of the United States Code. Their decision was based on the language of the 1968 Act that "construction * * * be carried out in accordance with all applicable provisions of Title 23 of the United States Code" and their interpretation of the legislative history as indicating that "construction" includes the planning phases of the projects. The holding of the Court is stated succinctly:

> We hold that Section 23 requires that both the planning and the building of the Three Sisters Bridge comply with all applicable provisions of Title 23. Since the District Court ruled otherwise, we remand the case to the District Court for an expedited evidentiary hearing to

[9] D.C. Federation of Civic Associations, Inc. v. Volpe, No. 23,870 (D.C.Cir., 1970).

[10] D.C. Federation of Civic Associations, Inc. v. Volpe, —— F.2d —— (D.C.Cir., April 6, 1970) (MacKinnon, J., dissenting).

determine whether appellees have in fact complied with the provisions of Title 23.[11]

This Court has held the expedited evidentiary hearing called for by the Court of Appeals. The trial consumed over ten trial days, and produced a record of over 1,500 pages of transcript and more than 100 exhibits. Among the witnesses called were Secretary of Transportation Volpe,[12] Federal Highway Adminis-

[11] *Id.*, Slip op., at p. 22.

[12] The testimony of a cabinet officer was necessary in this case because of the somewhat unique circumstances surrounding the approval of the Three Sisters Bridge project by the Department of Transportation. The Secretary was personally involved in the attempts to solve the rapid transit-freeway impasse which preceded the August, 1969 approval of the project. Several of the decisions required by Title 23 were made personally by the Secretary for this project. Since some of these decisions were not committed to writing at the time they were made, it was only by allowing the questioning of the Secretary himself that the Court could ascertain whether the decisions were in fact made and what constituted the basis for the decisions.

The Court is aware that the Supreme Court in United States v. Morgan, 313 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed. 1429 (1941), prohibited the probing of the mental process of an administrative decision maker to determine his reasoning in reaching a decision. The interrogation of Secretary Volpe here was limited to the actions which he took, and the materials which he considered as the basis for his determination, rather than his mental process in considering these materials. The *Morgan* holding, *supra*, has been narrowly construed to permit such questioning. *See* Virgo Corp. v. Paiewonsky, 39 F.R.D. 9 (D.V.I.1966); Union Savings Bank v. Saxon, 209 F.Supp. 349 (D.D.C.1962); cf. Singer Sewing Machine Co. v. NLRB, 329 F.2d 200 (4th Cir. 1964).

In retrospect, the Court feels that its decision to require the Secretary to testify was a wise one. Mr. Volpe testified for over five hours concerning his role in the approval of the Three Sisters Bridge and the relation between the approval of the project and the restoration of the rapid transit appropriations. The Secretary impressed the Court as a sincere and dedicated

trator Turner, and District of Columbia Highway Department Director Airis. Relying on the Court of Appeals decision, this Court limited the scope of the remand hearing to the question of compliance with the applicable provisions of Title 23,[12] and did not consider the alleged noncompliance with other statutory provisions raised in the complaint.[13]

A preliminary question is the scope of this Court's power of review of the actions of the District of Columbia and federal officials which are challenged in this action. As a general rule, a presumption of regularity attaches to the actions of public officials taken within the scope of their authority. United States v. Chemical Foundation, Inc., 272 U.S. 1, 47 S.Ct. 1, 71 L.Ed. 131 (1926). When a statute authorizes an administrative official to make certain discretionary determinations, the scope of judicial review is unquestionably limited. It is not the function of the Court to substitute its judgment for that of the administrative official. Rather the Court must review the administrative determinations merely to insure that the public official has neither exceeded his authority nor

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public servant with many years of experience, and his honest straightforward testimony did much to elucidate the complex chain of events leading up to the August, 1969 approval of this project.

[12] The complaint in this action alleges noncompliance with the following sections of 23 U.S.C.: 402, 103, 128(a) and the Department of Transportation Policy and Procedure Memorandum (PPM) 20-8 implementing this section [23 C.F.R. Part 1, Appendix A (1970)], 134, 138 and 317. In addition, plaintiffs moved at the commencement of trial to amend their complaint to add 23 U.S.C. § 109(a), and this motion was granted.

[13] These include various sections of Title 7 of the District of Columbia Code as well as the following provisions of the United States Code: 16 U.S.C. §§ 1 and 470; 33 U.S.C. §§ 401, 403 and 525; and 49 U.S.C. § 1655.

has acted in a clearly erroneous manner. United States v. Shimer, 367 U.S. 374, 381-382, 81 S.Ct. 1554, 6 L.Ed.2d 908 (1961)

The Court feels, however, that actions taken to comply with Title 23 of the U.S. Code are not immunized from judicial review.[15] Rather the Court believes that the proper standard for review is set out in § 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1964), which provides that a reviewing court has the authority to:

> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
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> (A) arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.

This standard has been applied in at least two cases involving challenges to Interstate Highway projects. Citizens to Preserve Overton Park v. Volpe, 309 F.Supp. 1189, 1194 (W.D.Tenn.1970); Road Review League, Town of Bedford v. Boyd, 270 F.Supp. 650 (S.D.N.Y.1967).

It should be emphasized that the question before this Court is a limited one, i.e., have the District of Columbia and the Department of Transportation complied with the applicable provisions of Title 23? It is not for this Court, or for any Court to decide whether a bridge across the Potomac in the vicinity of the

[15] The recent cases limit the range of determinations which are committed to the unreviewable discretion of administrative officials. *See e.g.*, Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967); Medical Committee for Human Rights v. SEC, 432 F.2d 659 (D.C.Cir., 1970); Overseas Media Corp. v. McNamara, 128 U.S.App.D.C. 48, 56-58, 385 F.2d 308, 316-318 (1967). *See generally* Berger, Administrative Arbitrariness, A Synthesis, 78 L.J. 965 (1969); Jaffe, Judicial Control of Administrative Action 375 (1965).

Three Sisters Islands is needed, or if the bridge as presently planned is a worthwhile project which will be for the benefit or to the detriment of the local community. The policy considerations of whether to build this bridge or any of the disputed segments of the Interstate System in the District of Columbia have been aired over and over again through the years. They are not before this Court at this time. Congress in the 1968 Act has settled the question with its command that the bridge should be built. The issues before this Court are (1) whether the responsible officials of the District of Columbia and the Department of Transportation have made the determinations required of them by Title 23, and (2) whether those determinations were made rationally on the basis of the merits of the project and are supported by factual basis.

THE ALLEGATIONS OF POLITICAL PRESSURE.

Before proceeding with a section by section analysis of the question of whether there has been compliance with Title 23, the Court feels that it is appropriate at this time to comment on the issue of the alleged effect of political pressure on the federal and District officials which has been raised in this case. There is no question that the proposed freeway system for the District of Columbia has spawned a fierce and emotional political controversy, with strong feeling on the part of both the anti-freeway and pro-freeway factions. The action of the Congress in the 1968 Act in decreeing that certain projects be built was an extraordinary one in view of the declaration of policy in 23 U.S.C. § 103 (d) that projects for inclusion in the Interstate System should originate with the state involved. The impasse which resulted in the spring and summer of 1969 when the District of Columbia City

Council refused to seek reinstatement of the projects to the Interstate System was viewed by many as a test of the will of the local government to stand up to those members of Congress who control the destiny of the city on the one hand, and the will of Congress to impose its mandates on the city irrespective of the wishes of the local governing body on the other.

There is no question that the evidence indicates that strong political pressure was applied by certain members of Congress in order to secure approval of the bridge project. Congressman Natcher stated publicly and made no secret of the fact that he would do everything that he could to withhold Congressional appropriations for the District of Columbia rapid transit system, the need for which is universally recognized in the Washington metropolitan area, until the District complied with the 1968 Act. On July 9, 1969, the House of Representatives passed the conference version of the supplemental appropriations bill for the District of Columbia which did not include the rapid transit funds.[16] Congressman Natcher at that time made his position perfectly clear, stating that "as soon as the freeway program gets under way beyond recall then we will come back to the House and recommend that construction funds for rapid transit be approved."[17] Congressman Broyhill also threatened at that time to withhold other appropriations for the District unless the freeway program went forward.[18] Subsequently, on August 8, 1969, the District of Columbia revenue bill was reported to the House with an amendment which would "'freeze' the appropriation of any part of the authorized Federal payment to the District of Columbia, until the President has

[16] 115 Cong. Rec. H5743 (daily ed. July 9, 1969).

[17] *Id.* at p. 5737.

[18] *Id.* at p. 5738.

reported to the Congress that the city had committed itself irrevocably" to the construction of the freeway system.[19] On August 11, 1969, Congressman Natcher stated that the rapid transit funds would be released "when the President of the United States has reported to the Congress that the District of Columbia has begun work on each of the projects" included in § 23 of the 1968 Act.[20]

The House of Representatives was not alone in its concern for a prompt resolution of the freeway-rapid transit impasse. On July 22, 1969, the members of the Senate Committee on the District of Columbia sent a joint letter to the members of the City Council urging that they act to resolve the impasse and thereby insure that the rapid transit system would be built.[21] On April 28, 1969, the President sent a message to Congress in which he stated in part as follows:

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[19] H.R.Rep. No. 91-463, 91st Cong., 1st Sess. 21 (1969).

[20] 115 Cong.Rec.H 7212 (daily ed. August 11, 1969).

[21] The letter stated in part as follows (plaintiffs' exhibit 1621):

> We are writing to express our deep concern over the continuing freeway-subway impasse which is undermining any hope of constructing the rapid mass transit system we have worked so long to realize.
>
> Unless construction of the system is begun soon, the financial arrangements agreed to by the Congress and by the area's local jurisdictions will collapse under the weight of rapidly inflating construction costs. And, as you know, construction cannot begin until the House District Subcommittee appropriates some part of the District of Columbia share in the cost of the system.
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> . . . . . .
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> Despite our mutual frustration, there is no time left for beating the air or for unrealistic posturing. The question is not whether we have freeways or subways, but whether we will ever have a rapid transit system at all.
>
> We urge the Council to exercise the utmost flexibility to avoid the disaster which further delay in this matter portends.

> The impasse which has arisen between the proponents of road and rail transportation in the Washington Metropolitan area has contributed little to the progress of either. There are, however, signs that a fair and effective settlement of these issues will be reached in the near future."

The issue in this case is whether there has been compliance with Title 23 of the United States Code for the Three Sisters Bridge project. Therefore, the pressure exerted by members of Congress is relevant only to the extent that it may have caused public officials, who had responsibilities under Title 23 to consider the project on its merits, to disregard those responsibilities. The Court expresses no opinion on the tactics employed by Congressman Natcher and others in support of their position that the bridge should be built. There has been no allegation nor proof that the actions of Mr. Natcher or any other individuals were in any way dishonest, illegal, or unusual under the circumstances or motivated by any factor other than their desire to see the implementation of the provisions of § 23 of the 1968 Act. But if these actions had the effect of causing other officials to disregard obligations imposed on them by statute, then this Court must halt construction of the bridge until those officials have satisfied their statutory obligations.

The plaintiffs contend that the Congressional pressure directly influenced (1) the decision of the District of Columbia City Council to proceed with the Three Sisters Bridge project, (2) the decision of the Department of Transportation to redesignate the bridge as part of the Interstate Highway System, and (3) the decision of the Bureau of Public Roads and the District of Columbia Department of Highways

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" 115 Cong. Rec. 10629 (1969).

and Traffic to accelerate the schedule for the commencement of the construction on the project.

The principal focus of the Congressional pressure was the District of Columbia City Council, whose vote in December, 1968, had led to the deletion of the bridge from the Interstate System. The action of the Council on August 9, 1969, approving the Three Sisters Bridge was the direct result of this pressure. At the time that the Council voted by a margin of six to two to approve the bridge, three of the members who voted in favor of the project issued statements that they were doing so, not because of their conviction that the bridge was necessary or that it would be beneficial to the local community, but as a direct result of the Congressional pressure and threats to delete or withhold appropriations for the rapid transit system.* If the City Council had not yielded to this pressure and approved the bridge project, it would not have been redesignated as part of the Interstate System, since it was in response

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* Plaintiffs' exhibit, 117. For example: Council Chairman Hahn stated:

> This City needs and requires a subway system as part of its overall mass transportation system. The people who need the subway the most are those for whom we are most concerned, the low income citizens of our inner city. Unfortunately, this citizen cannot produce the system for himself and he needs the $1.5 Billion which the Congress is prepared to provide as the District's share of the subway system. There is no other way.
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> The Congress of the United States has said clearly that it will not provide the subway money unless the bridge is started. * * * I believe the building of the bridge is wrong and I am still not convinced that it is in the best interests of the City. * * * We are forced at times to make rather hard choices—either build the bridge or no subway.

See also the statement of Councilman Yeldell that "[p]ainful and pressing political realities indicate that we must yield."

to the request of the District of Columbia that the redesignation was made. The Council, however, was acting as a legislative body in this instance, and the application of pressure by one legislative body, in this case Congress, on such a body is not unusual. Therefore, the fact that the Council action in approving the bridge was a direct result of the Congressional pressure and threats regarding the rapid transit appropriations does not, in and of itself, mean that there has been noncompliance with Title 23.

A more serious allegation by the plaintiffs is that Secretary of Transportation Volpe, in directing the Federal Highway Administrator to redesignate the bridge as part of the Interstate System, did not base his decision solely on the basis of the merits of the project, but was acting in response to the Congressional pressure regarding the rapid transit appropriations. There is no question that the Secretary was aware of the nature of the impasse between the Congress and the City Council. He testified that soon after taking office, he undertook to try to resolve the problem. (Tr. 668). In June, 1969, when the supplemental appropriations bill for the District was pending, the Secretary was hopeful that the Senate version would be approved and that the funds for the rapid transit system would be included. (Tr. 675). On June 25, 1969, after the City had agreed to go forward with several freeway projects other than the Three Sisters Bridge, the Secretary issued a statement that he was hopeful that this action would help bring about the release of the rapid transit appropriations. (Plaintiff's exhibit 78). Mr. Volpe also recalled that he was aware of the threat to withhold the entire federal payment for the District unless affirmative action was taken on the freeway program. (Tr. 692–93). The

statement issued by the Secretary at the time he directed the Federal Highway Administrator to restore the bridge to the Interstate System indicates that the pressure on the rapid transit funds was a consideration at that time." Also in connection with the decision to go ahead with the bridge project, President Nixon in a letter to Congressman Natcher, dated August 12, 1969, reviewed the actions of the City Council and the Department of Transportation and stated: "I trust that these actions will fulfill the criteria which you set forth in your statement of August 11, 1969." [2]

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[1] The press release issued by the Secretary on August 12, 1969, included the following statement (plaintiffs' exhibit 81):

> It is my conviction that this fairminded and courageous action [of the City Council] * * * and the commitment of the Department of Transportation to complete the projects required by the Federal-Aid Highway Act of 1968, will result in approval by the subcommittee on appropriations for the District of Columbia of the District's share of appropriations for the area's rapid transit system.

[2] Plaintiff's exhibit 82. The President's letter in its entirety stated:

> Your diligent efforts through the years to ensure that the District of Columbia will enjoy a balanced transportation system are very much appreciated by all of us who are concerned with the welfare of our Capital City. As you know, I have previously expressed my desire that a fair and effective settlement of the issues involved in the transportation controversy be reached to serve the interests of all those concerned—central city dwellers, suburbanites, shoppers, employees and visitors. It is my conviction that those steps necessary for a fair and effective settlement have been taken.
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> The City Council of the District of Columbia has now voted in favor of a resolution to complete the requirements of the Federal Aid Highway Act of 1968. Immediately thereafter, the Commissioner of the District of Columbia directed the Department of Highways to implement immediately the requirements of the Act. The Secretary of Transportation has directed the Federal Highway Admin-

The mere fact that the Secretary was aware of the Congressional pressure to build the Three Sisters Bridge is not sufficient to invalidate his action in directing that the bridge be restored to the Interstate System. Since the issue in this suit is whether there has been compliance with Title 23 of the United States Code, the political pressure exerted by members of Congress is relevant only as to whether it may have caused Secretary Volpe to act without considering the merits of the project as required by Title 23. As will be discussed in connection with § 138, Mr. Volpe commenced an exhaustive study of the merits of the Three Sisters Bridge project soon

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istrator to rescind the letter of his predecessor dated January 17, 1969, thus placing these projects back into the Interstate System. Furthermore, the Federal Highway Administrator has been directed to work closely with the Highway Department of the District of Columbia in order to continue work until completion of all projects and the study called for in the Federal Aid Highway Act of 1968. I trust that these actions will fulfill the criteria which you set forth in your statement of August 11, 1969.

The District of Columbia Government is firmly committed to completion of these projects as the Federal Aid Highway Act of 1968 provides. I join the District of Columbia Government in that commitment, and I have directed the Attorney General and the Secretary of Transportation to provide assistance to the Corporation Counsel of the District of Columbia to vigorously defend any lawsuits which may be filed to thwart the continuation of the projects called for by the Act.

A balanced transportation system is essential for the proper growth and development of the District of Columbia. I hope that this evidence of tangible progress would permit us to assure the citizens of the District of Columbia that your subcommittee will be in a position to approve the $18,737,000 deleted from the Supplemental Appropriation bill together with the $21,586,000 in the Regular Appropriation bill for the District of Columbia Fiscal year 1970.

after taking office, and did not come to a decision that the bridge was essential until the Summer of 1969. The Court believes the Secretary's testimony that his decision was based on the merits of the project and not solely on extraneous political pressures.[9]

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[9] See Tr. 816, 818:

[Mr. McKevitt] Thank you, Mr. Secretary. Was your decision to place the Three Sisters Bridge back on the system and your decision under 4-F or 138 U.S.C., Title 23, based upon any political pressure?

[Secretary Volpe] I would say that political pressure was not a factor at all in my judgment. I was approached, yes, by Congressmen who wanted the Freeway System built. Some wanted the Three Sisters Bridge built, some did not. I had all kinds of requests, but I had been in Washington before. Many of the members of Congress I knew personally and intimately, and they know I don't bend very easily. They did bring to my attention facts and their hope that I would consider all these facts in the judgment that I made as to whether or not the Three Sisters Bridge would be included or reincluded in the Inter-state System. And it was on the basis of all the facts, as I brought them together in the 4-F areas that I have spoken about that I made my final decision.

* * * * *

[Mr. Owen] Mr. Secretary, Mr. McKevitt asked you about political pressure. In the summer, July and August of 1969, it was your hope, was it not, that the Congress would release the Subway funds?

[Secretary Volpe] Of course. Yes.

[Mr. Owen] Did that hope in your mind have any influence at all on your decision to put the Three Sisters Bridge project in the interstate system at all?

[Secretary Volpe] It would have had absolutely no bearing on my decision if I had felt the Three Sisters Bridge was not essentially necessary. I found it was essentially necessary; therefore, that was the reason for my proceeding along the lines I did, hopeful that the Congress would release the funds for the transit system, because I knew that one without the other, in this case, would not have done the job.

It is true that Mr. Volpe was also interested in securing the release of the rapid transit appropriations, and that the approval of the bridge led to the release of those funds. But the Court finds that the mere fact that the Secretary was aware of this pressure does not invalidate his decision that the Three Sisters Bridge is an important and necessary part of the Interstate Highway System.

The plaintiffs contend that the present situation falls within the rule set forth in Jarrett v. Scrivener, 225 F.Supp. 827 (D.D.C.1964). In that case a group of citizens challenged the action of the District of Columbia Board of Zoning Adjustment in approving an exception to the zoning regulations for the construction of a new Soviet embassy in a residential area of Northwest Washington on the grounds that certain members of the Board had been subject to secret contacts from high government officials who favored the grant of the exception. Judge Pine ruled that these off the record contacts amounted to a denial of the plaintiff's rights to a fair and impartial hearing before the Board. The Court did not find that there was any intentional wrongdoing on the part of either the Board members or the officials who contacted them. All that was necessary to invalidate the actions of the Board was that the significant *ex parte* contacts were made with the intent of influencing the Board's decision and that the contacts "were of such a character that it may reasonably be inferred that they did impair, consciously or unconsciously, [the Board's] independence of judgment." 225 F.Supp. at 834.

The plaintiffs contend that the Congressional pressure for the construction of the Three Sisters Bridge was of such a character that it can reasonably be inferred that it had some influence, conscious or unconscious, on the decision of the Secretary to redesignate

the bridge as part of the Interstate System. From the evidence of the contemporaneous statements of Secretary Volpe and his testimony in this case, there is no question that the pressure regarding the rapid transit appropriations was given some consideration at the time of the approval of the project in August, 1969. But the Court concludes that this does not invalidate the decision of the Secretary in this case. The situation here is distinguishable from that in the *Jarrott* case. The Court there emphasized that the Board of Zoning Adjustment was a quasi-judicial body with an obligation to give all interested parties a fair hearing before reaching its decision. The basis of the decision invalidating the Board's action was that the secret *ex parte* contacts deprived the plaintiffs of their fundamental right to a fair and impartial hearing. In contrast, the Secretary, in approving the redesignation of the Three Sisters Bridge to the Interstate System, was not performing a judicial or quasi-judicial function. The statute commits the decision to the Secretary's discretion. There is no requirement that he base his decision only on matters presented at a public hearing, but rather, there is only the implied requirement that he base his decision on the merits of the project. In view of the Secretary's testimony that he made an exhaustive review of the merits of the project and based his decision on that study, this Court will not invalidate his decision. The present case is further distinguishable from *Jarrott* in that there the contacts with the Board were secret, while here the actions of Congressman Natcher and others are a matter of public record contained in official Congressional documents and speeches made on the floor of the House of Representatives.

Nor does the fact that the Secretary acted in response to the action of the District of Columbia City

Council affect the validity of his decision. The plaintiffs argue that since the Congressional pressure on the rapid transit funds was the direct cause of the approval of the bridge by the City Council, and since the Secretary would not have directed the redesignation of the bridge as part of the Interstate System had the City Council not approved the bridge, then it must follow that the Congressional pressure on the rapid transit funds was the direct cause of the redesignation. The Court rejects this argument. Merely because the City Council acted as a result of Congressional pressure and the Secretary would not have acted if the City Council had not acted, this does not mean that the Secretary acted because of Congressional pressure. The Secretary's obligations under Title 23 are entirely separate from any obligations which the City Council might have. The Court's finding that the Secretary acted on the basis of his judgment as to the merits of the bridge project is therefore unaffected by whatever may have been the motivation of the City Council in approving the bridge.

The final alleged effect of the Congressional pressure on the Three Sisters Bridge project is the acceleration of the commencement of construction. The reaction on the part of officials of the Bureau of Public Roads and the District of Columbia Department of Highways and Traffic to the approval of the bridge project was swift. On August 15, 1969, the Bureau of Public Roads Division Engineer for the District of Columbia, Mr. Hall, in a letter to Mr. Airis, the Director of the District highway department, stated that, although he could not approve the Type, Size and Location Report for the bridge which had been submitted by the District because no final determination had yet been made as to the type of superstructure which would be built, he was authoriz-

ing the preparation of contract plans for the piers of the bridge "[i]n an effort to initiate early construction of the bridge." (Plaintiffs' exhibit 85). In a letter accompanying the submission of the plans, specifications and estimates for the piers to Mr. Hall on September 2, 1969, an official of the District highway department, Mr. Sawyer, stated that this action was being taken "due to the urgency in getting this project under way." (Plaintiffs' exhibit 89). Mr. Hall noted on the letter that the bidding period was being shortened from three to two weeks "because of the urgency of starting construction at the behest of Congress and the need of DC for WMATA [rapid transit] money." On September 3, 1969, the District invited bids for the pier construction contract. The bids were opened on September 17, 1969, the contract was awarded the following day, and construction was begun later that month. Congressman Natcher was kept apprized of these developments by Mr. Airis. (Plaintiffs' exhibits 94, 95).

The above evidence establishes that the construction work on the project was undertaken in great haste in an effort to satisfy Congress that § 23 of the 1968 Act was being complied with by the District of Columbia. The fact that construction was begun on this project faster than normal, however, does not bring this project into noncompliance with any provision of Title 23. The acceleration of the normal schedule is only relevant if in their haste to appease certain members of Congress, the officials involved failed to carry out the responsibilities imposed on them by Title 23. The Court finds that the actions of the Bureau of Public Roads and District of Columbia officials in accelerating the commencement of construction on the bridge project were reasonable under all of the facts and circumstances of this case. Congress had directed in

§ 23 of the 1968 Act that the Three Sisters Bridge should be built, and that work on the project should begin within 30 days of the enactment of the statute. Because of the refusal of the City Council to approve the bridge until August, 1969, a year had elapsed since the enactment of the 1968 Act with no progress in carrying out the mandate of Congress. Therefore it was reasonable for the highway officials involved to proceed as fast as possible with the commencement of construction of the project, provided that there was compliance with all applicable provisions of Title 23.

23 U.S.C. § 138

I

This section provides as follows:

> It is hereby declared to be the national policy that special effort should be made to preserve the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent al-

> ternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.[27]

This section embodies the intent of Congress that whenever possible parklands should not be used for highway projects.[28] It is not, however, an absolute prohibition against the use of such public lands. Rather, the statute makes the use of parklands contingent on the discretionary determination of the Secretary of Transportation that (1) there is no feasible and prudent alternative to the use of such land, and (2) the program includes all possible planning to minimize harm resulting to the parkland from such use.

There is no question that the Three Sisters Bridge project as presently planned will require the use of some public parkland on both the Virginia and District of Columbia sides of the Potomac. Land on both sides of the river in the vicinity of the planned bridge is currently dedicated to public park use under the jurisdiction of the National Park Service of the Department of Interior. In addition, construction of the bridge will affect the Georgetown Historic District. Therefore § 138 prohibits the approval of the bridge project by the Secretary unless the two criteria set out in the section have been met.

In contrast with the duties imposed upon the Secretary by other provisions of Title 23, the obligations under § 138 have not been delegated to subordinates within the Department of Transportation. The Secre-

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[27] This section is identical to section 4(f) of the Department of Transportation Act [49 U.S.C. § 1653(f) (Supp. V, 1970)].

[28] For a more complete discussion of the legislative history of this section, see Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189, 1194–1195 (W.D.Tenn. 1970).

tary has reserved for himself the crucial decision required by § 138 for projects involving the use of public parklands. (Tr. 641). It was for this reason that it was necessary that Secretary Volpe be a witness in this case.[29]

The plaintiffs base their position that there has been no compliance with this section on three principal contentions. The first is that the Secretary, prior to approving the redesignation of the Three Sisters Bridge to the Interstate System in August, 1969, made no determination either that there were no feasible and prudent alternatives to the use of the parkland involved or that the program for the bridge included all possible planning to minimize the harmful effects to the parkland.[30] Plaintiffs' second contention is that, assuming the Secretary did make the determination that there is no feasible and prudent alternative to the use of parkland, then this determination was arbitrary and capricious in that there are, in fact, such feasible and prudent alternatives, and that the Secretary did not consider and rationally reject each of these alternatives. The third argument is that even if the Secretary did make the determination regarding all possible planning, then that determination is also arbitrary and capricious in that there is no factual basis for such a finding.

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[29] See n. 12, *supra*.

[30] The question has arisen whether § 138 requires that any finding or determination be made by the Secretary. Chief Judge Brown, in Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D.Tenn. 1970), held that the statute does not require the Secretary to publicly articulate any finding on the § 138 requirements. 309 F.Supp. at 1194. The section is mandatory, however, in its prohibition of the use of parklands unless the two requirements are met. Therefore, the section requires the Secretary to make at least a mental finding, based on the information known to him, that the two requirements have been met before he can lawfully approve a project.

The major problem confronting this Court in making its determination of whether there has been adequate compliance with § 138 is the lack of any meaningful administrative record within the Department of Transportation evidencing the fact that proper consideration has been given to the requirements of this section. The only contemporaneous written record of Secretary Volpe's determination was a press release issued by the Department of Transportation on August 12, 1969. (Plaintiffs' exhibit 81; Tr. 729–30). This press release, however, makes no mention of any determination under § 138, but merely announces the Secretary's approval of the Three Sisters Bridge project.

Although the testimony at the trial was somewhat contradictory, it appears that the Department of Transportation did not establish definitive procedures for the orderly consideration of § 138 problems until January, 1970. In addition, the evidence indicated that the procedures that had been established at the time of the approval of this project in August, 1969, were not utilized in the consideration of this project. In early 1969, Secretary Volpe created the Office of Environment and Urban Systems, and appointed James Braman as Assistant Secretary to head that office. Mr. Braman testified that, although he was involved in several projects with § 138 problems immediately upon taking office, no formal procedures for the submission of information to his office and for the preparation of recommendations by his office had been established by August, 1969. (Tr. 1008). Mr. Braman was not involved in any way with the Three Sisters Bridge project, as was usually the case in a project involving parklands. (Tr. 1004, 1012). Similarly Rex Wells, the Chief of the Bureau of Public Roads' Office of Systems and Locations, testified that, while

it was normally the responsibility of his office to prepare a recommendation for the Secretary regarding all projects covered by § 138, and that this responsibility had been delegated to his office in June, 1969, no such recommendations had been made prior to August, 1969. (Tr. 277). A third official of the Department of Transportation, Charles Hall, the Division Engineer, with supervisory authority over Interstate Highway projects in the District of Columbia, testified that he departed from the normal procedure in that he did not prepare a § 138 recommendation for this project. He testified that he was superseded by his superiors, and was not asked to prepare a recommendation in the interest of "speed * * * to get the project started." (Tr. 499–501).

In view of the decision not to follow the normal procedures in the consideration of the § 138 requirements for the Three Sisters Bridge project, and the failure of the Department of Transportation to make a record of the determinations made by the Secretary at the time of his approval of the project in August, 1969,[31]

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[31] As noted previously, the only contemporaneous written record of the Secretary's determinations is the press release of August 12, 1969, (plaintiffs' exhibit 81), which is silent as to any consideration of § 138 factors. While it might be argued that a favorable determination of the § 138 issues is inherent in the Secretary's approval of the project, the mere fact that the project has been approved is of no significant probative value as to the question of compliance with § 138.

There was much testimony and argument at the trial about the so-called Holmes Memorandum (plaintiffs' exhibit 98). This document dated October 15, 1969 purports to set forth the grounds for the Secretary's determinations as to the § 138 requirements. It is addressed to Secretary Volpe from E. H. Holmes, Acting Federal Highway Administrator, and the concurrence of the Secretary in the conclusions set forth in the memo is noted with the date of October 15, 1969. Several factors lead

this Court must base its determination of whether there has been compliance with § 138 on the testimony of Secretary Volpe at this trial, taken together with any corroborating circumstances or testimony of other witnesses.

In reviewing the testimony of Secretary Volpe, it must be kept in mind that § 138 clearly commits to the Secretary's discretion the determination that there is no feasible and prudent alternative to the use of the parkland and that the program includes all possible planning to minimize harm to the parkland. This Court is merely reviewing the actions of the Secretary to determine whether they have a basis in fact, and that they do not amount to an abuse of discretion. The wisdom of the statutory scheme of committing such decisions to administrative officials experienced in the area of their jurisdiction, rather than to courts, is

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this Court to the conclusion that this document is of little or no probative value on the question of compliance with § 138 by the Secretary. It was prepared in October, 1969, two months after the Secretary's alleged compliance with § 138. It was prepared after the filing of the complaint in this action, which alleged, among other things, that the Secretary had failed to properly make the findings required by § 138. It was prepared by Mr. Wells at the request of Edwin Reis, a lawyer in the Department of Transportation who was actively engaged in the defense of this lawsuit. (Tr. 170, 177, 420–23). On October 16, 1969, one day after the date of the memo, it was filed in this action as an exhibit in opposition to plaintiffs' motion for a preliminary injunction. Both Mr. Reis and Mr. Wells testified that they could not recall another instance in which such an after-the-fact memo had been prepared to represent what had been considered at the time a decision had been made. (Tr. 285, 430). And both Mr. Reis and Mr. Wells testified that they did not know from their personal knowledge if the Secretary had ever made a § 138 determination, (Tr. 163, 424) or if he had, what constituted the basis for the determination (Tr. 163, 190, 425–26).

evident in the present situation. Secretary Volpe has a wealth of experience in the planning of projects such as the one involved in this case. He has taken college level courses in planning and has held several positions in public life, including that of Commissioner of Public Works of Massachusetts, Federal Highway Administrator, and Governor of Massachusetts for three terms. (Tr. 813–16). The court therefore feels that Secretary Volpe's judgment on these matters is entitled to great weight.

The first question before the Court is whether the Secretary, prior to approving the redesignation of the Three Sisters Bridge to the Interstate Highway System made the determinations required by § 138, i.e., that there was no feasible and prudent alternative to the use of the parklands involved in the project and that the program included all possible planning to minimize the harmful effects of the project on parkland. Mr. Volpe testified that he did in fact make the required determinations in connection with his decision to approve the bridge project.[32] Although as explained

[32] See Tr. 712–13:

> [Mr. Owen] Directing your attention specifically to the Three Sisters Bridge, you have told us that you put some projects back into the Interstate System on August 12. Did you make any other determination at that time with respect to the Three Sisters Bridge project?
>
> [Secretary Volpe] Yes. Yes, I was doing that for the entire period prior to August 12 and had been studying, as I say—I could assemble and asked our staff to assemble with regard to both statistics on the volume of traffic, the question of environment; and even though there was a difference of opinion, frankly, in our own shop as to whether or not 4(f) applied because of the Congressional Act of 1968, I nevertheless felt that we still ould consider it and determined that I should consider it; and on the basis of my own judgment, the judgment of our General Counsel, who concurred, that—shall we say it is better to be safe than be

above, no credible written record of this determination was made,[33] this Court believes Mr. Volpe's testimony on this matter. The Secretary impressed the Court with his forthright testimony. The Court is convinced from his testimony and the facts developed at trial that he is an honest, experienced, and dedicated public servant who did make the determinations required of him by § 138 prior to signifying his approval of the Three Sisters Bridge project.[34]

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certain that we were completely in accord with all the statutes—not withstanding the fact that the Congressional act was passed.

We reviewed very carefully during those weeks both the traffic estimates, the previous studies, the updated studies, the Department of Interior recommendations which had been made, the National Park Services, and all the other elements that enter into a decision-making process, including listening to comments and suggestions from both those who were opposed as well as those who were for the construction of all or part of the freeway system, including those who were for and against the Three Sisters Bridge.

That all was a part of our decision-making process.

[Mr. Owen] Let me see if I understand you correctly.

Are you saying that you did make a Section 138 or a Section 4(f) determination with respect to the bridge in August of 1969?

[Secretary Volpe] This was approximately the early part of August, as near as I can recall, yes.

[Mr. Owen] Do I understand that 4(f) decision was made, so to speak, as part of the decision to put the bridge back into the Interstate System?

[Secretary Volpe] It was, yes, a combined judgment that, one, was essential and necessary; and, secondly, did we comply with Section 4(f) or could we comply with Section 4(f) if this was placed back in the System and determined that the answer was yes in both areas.

[33] See n. 31, *supra*.

[34] See n. 26, *supra* and accompanying text for a discussion of the effect of the political pressures on Mr. Volpe's actions in approving the bridge project.

The Court does not consider the lack of a contemporaneous written record of the § 138 determinations and the failure of the Secretary to utilize the normal decision making channels within the Department of Transportation, such as they were at the time of the decision on this project, fatal to the Secretary's assertion that he made the required determinations. As discussed above, there is no requirement that the Secretary publicly articulate his § 138 determination.[35] Secretary Volpe noted in his testimony that at the time that this project was under consideration the Office of Environment and Urban Systems had not established the procedures for handling § 138 problems which are now in effect. (Tr. 725). The Secretary also pointed out that Assistant Secretary Braman, who headed that office, would not have been as involved in the Three Sisters Bridge project as he would in other projects given § 138 consideration at the same time because of the close personal involvement of the Secretary in this project. (Tr. 808). This appears to the Court to be a reasonable explanation of the procedures followed in this case.

II

Given this finding—that the determinations required by § 138 were made by the Secretary, the next question before the Court is whether the Secretary acted reasonably in reaching his decision that there were no feasible and prudent alternatives to the use of the parklands, i.e., whether the Secretary adequately considered the feasible alternatives to the presently planned project and whether there were in fact feasible and prudent alternatives to the use of the parkland.

[35] See n. 30, *supra*, for a discussion of Citizens to Preserve Overton Park, Inc. v. Volpe, 309 F.Supp. 1189 (W.D.Tenn. 1970).

Much of Secretary Volpe's testimony was taken up with inquiry as to the considerations which led to his decision that the § 138 requirements had been met. Mr. Volpe became personally involved in the problems of the Interstate Highway System in the District of Columbia soon after assuming office in January, 1969. (Tr. 650). While much of his activity was directed at achieving a settlement of the impasse which had arisen between the City Council and members of Congress, the Secretary emphasized that he conducted a comprehensive review of the merits of the projects involved, including the Three Sisters Bridge. The Secretary stated:

> [E]arlier in the year [1969] I asked that consideration be given to any possible locations whether [a bridge] was needed, as a matter of fact, at all. In other words, I went at this with a completely open mind, and asked that my people consider it on the same basis, not on the basis of judgments they had made two years, four years or five or one year before, but on the basis of the most recent and up-to-date material they could procure. That's the same way I approached it, with a completely open mind; and until I was presented with the kind of data and documents and statistics that were, in my opinion, conclusive as to the need, I did not make up my mind as to whether or not a Three Sisters Bridge should be built. (Tr. 778–79).

Mr. Volpe testified that he considered the § 138 factors throughout his study and evaluation of the bridge project, (Tr. 712) and that he had discussed these factors with several staff members, including the Federal Highway Administrator, the General Counsel of the Department of Transportation, the Undersecretary of Transportation, and his administrative assistant. (Tr. 722). This statement is supported by the testimony of Mr. Turner, the Federal

Highway Administrator, that consideration of § 138 requirements was inherent in all discussions of the project, and in fact was "almost a controlling factor" in any action taken on the project. (Tr. 978).

There was much questioning of Secretary Volpe as to the documents, studies, and other materials which he considered and which formed the basis for his § 138 determination that there were no feasible and prudent alternatives to the use of the parklands. The Secretary of Transportation is an extremely busy official with responsibility for thousands of decisions each year, and therefore he could not possibly be expected to remember with any degree of certainty all of the materials and data which formed the basis for any particular decision. Nor could the Secretary be expected to personally study all of the details of each of the documents which are presented to him as the basis for a particular decision. (Tr. 743–44). The Secretary stated at several times during his testimony that he had considered many documents and studies presented to him by his staff as well as the staff summaries of their contents. (Tr. 770, 773–74, 793).[36] In

[36] A great deal of confusion about the materials which the Secretary considered in preparation for his § 138 determinations has been caused by the Holmes Memorandum. See n. 31, *supra*. The memo states in part:

> There have been several studies during the past 20 years of transportation needs of the District of Columbia Metropolitan area, such as a 1953 Virginia study by Wilbur Smith and Associates, the 1959 Transportation Plan-National Capital Region, and the 1961 Plan for the Year 2000. These studies demonstrate that there is a need for an additional Potomac River highway bridge between Key Bridge and Chain Bridge.

The three studies named do support the need for a new Central Potomac crossing, but, of course, they are not the only studies on the subject, and there are several other studies which do not recommend the construction of a new crossing. Many of these

addition, the Secretary consulted with various representatives of the community, who took positions on both sides of the issues of whether the bridge should be built. (Tr. 801–02, 817).

The Court concludes that the Secretary and his staff did make an adequate study of the feasible alternatives to the use of the parkland involved in the project as presently planned. The Secretary testified that the alternatives considered included not building a bridge, building a tunnel, building a bridge at the Three Sisters location, and building a bridge at another location. (Tr. 712–13, 724, 778). As summarized above, the Secretary made an exhaustive personal review of many of the reports and studies which have been prepared over the years on the need for and the possible alternative types of furnishing a new Central Potomac crossing before approving the bridge project. The Court is not prepared to find that the plaintiffs have established that an inadequate study of the possible alternatives was made merely because the Secretary could not recall at his examination in this case, a year after his decision to approve the bridge, whether he had considered certain admittedly relevant studies

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other studies are more recent than those enumerated in the memo.

The question arose whether the three studies named were the only materials reviewed by the Secretary before he approved the bridge project. Although some confusion may have arisen at the Secretary's deposition, he made it quite clear at the trial that the Holmes Memorandum is not an inclusive catalogue of the materials which he considered. (Tr. 727). As was pointed out by the Secretary, the language immediately preceding the enumeration of the three studies is "several studies * * * *such as* * * *." (Tr. 796). It is therefore quite evident that the Secretary in indicating his concurrence with the memo, did not intend to say that the three studies enumerated were the sole basis of his decision.

and reports or that he could not recall details of the contents of certain of these documents.

The Court also concludes that the determination by the Secretary that there is no feasible and prudent alternative to the use of the parklands as presently planned was not an abuse of his discretion in that it is supported by the record in this case. The crucial requirement of the statute is that the Secretary is called upon to determine that there is no "*prudent*" alternative to the use of the parkland. Thus, while there may be several feasible or possible alternatives to the use of the parkland presently planned to be used for the bridge project, the key decision committed to the discretion of the Secretary is whether, *in his judgment*, any of these possible alternatives is prudent or wise.

In reviewing the Secretary's determination, two factors must be kept in mind. The first is that § 23 of the 1968 Act at the very least expresses the will of Congress that some type of Central Potomac crossing must be built. Therefore the alternative of not building any crossing and thereby not affecting in any way the parkland bordering the river, was foreclosed to the Secretary. The second consideration is that any type of Central Potomac crossing would involve the use of some parkland. Although it may be true that some of the possible alternatives proposed over the years might have a less substantial effect on parkland than the present plan, the fact that the use of some parkland is inevitable in the construction of any crossing is certainly a legitimate factor to be considered in reviewing the § 138 decision.

The Court concludes that the plaintiffs have not sustained their burden of proof that the Secretary's determination that there is no feasible and prudent alternative to the use of the parklands to be used in the

presently planned project was arbitrary and capricious. While over the years there have been several studies which urge that no new Central Potomac crossing be built or that it might be built at a location other than that presently planned, there is also substantial evidence of the need for a crossing in the area, and of the advisability of a bridge similar to that presently planned. This Court in the exercise of its limited power of judicial review, cannot state that any of the other proposals, while they may be feasible, would be prudent in that they would better serve the transportation needs of the Washington metropolitan area as well as have a less drastic effect on parklands on the banks of the Potomac.

III

The final question before the Court under § 138 is whether the Secretary's determination that the program for the Three Sisters Bridge included all possible planning to minimize harm to the parklands, was arbitrary and capricious in that it was not supported by the actual status of the planning process for the bridge project.

The plaintiffs advance several arguments to support their contention that Secretary Volpe could not have made a rational determination that the bridge program included all possible planning to minimize harm to the parklands. The first is that no final plans had been developed for the ramps and interchanges for the bridge, which would have a direct impact on parkland in that they would be built at least in part on public parkland on both sides of the river. The plaintiffs also argue that this requirement of § 138 has not been met in that there have been no studies of the possible effects on the parkland of increased air pollution which might be caused by the bridge project,

and that several planning agencies were not consulted for their views on the project's effect on the parklands.

There is no question that the final designs for the ramps and interchanges have not been completed at this time. (Tr. 621). While this may be an important consideration in determining whether construction is properly going forward in compliance with other sections of Title 23, the Court does not believe that this establishes that the Secretary's approval was improperly given under § 138. Secretary Volpe testified that he based his determination on the preliminary planning for the ramps and interchanges which had been done at that time. Although he conceded that the final design of the ramps was not complete, he pointed out that there were very limited alternatives available. He stated that before he approved the bridge project, he was satisfied, and the Department of Interior, which had jurisdiction over the parklands, was satisfied, that the designs which would be developed based on the preliminary plans would result in a minimum taking of parkland. (Tr. 736–38).

The crucial consideration is that the program for the project includes all possible planning to minimize harm to the parklands. The Secretary has testified that he was satisfied that the planning which had been done indicated that a minimum of parkland would be taken for the ramps and interchanges for the bridge. The Court believes that this satisfies the requirements of the statute, and it will not disturb the Secretary's reasonable exercise of the discretion granted him by the statute. It should be noted that the National Park Service, the agency charged by statute with "conserv[ing] the scenery and the natural and historic objects and wildlife" within federal parklands, and with "provid[ing] for the enjoyment of the same in such

manner and by such means as will leave them unimpaired for the enjoyment of future generations,"[37] has approved the Three Sisters Bridge project. (Defendants' exhibits 16, 18).

Plaintiffs' other contentions are similarly insufficient to rebut the presumption of regularity attaching to the Secretary's actions. While it is true that there has been no study of the possible air pollutional effects of the bridge project, this Court will not write such a requirement into the statute. The Secretary testified that air pollution was an overall consideration in this as well as all interstate highway projects. (Tr. 811). This is sufficient to satisfy the requirements of this section. Nor is the failure to consult with certain planning and advisory groups necessarily fatal to the Secretary's action. Affording the Advisory Council on Historic Preservation an opportunity to comment on highway projects affecting historic sites is required by 16 U.S.C. § 470 (Supp. V, 1970). But this project has been exempted from compliance with this and all other statutory requirements other than those of Title 23 of the U.S. Code by § 23 of the 1968 Highway Act.[38] In any event, the Court is not convinced that the Secretary foreclosed to the Advisory Council the opportunity to exercise their statutory function. The statute commits the determination of whether adequate planning has been done to the discretion of the Secretary, and this Court will not dictate what "all possible planning" consists of in this case and where it feels that the defendants have made a sufficient showing of substantial compliance with this section.

PPM 20-8

Policy and Procedure Memorandum (PPM) 20-8 was adopted by the Bureau of Public Roads on Janu-

[37] 16 U.S.C. § 1 (1964).

[38] See n. 7, *supra*, and accompanying text.

ary 14, 1969. It sets forth in detail the requirements for the public hearings called for in 23 U.S.C. § 128 (a), and is included in the Code of Federal Regulations.[39] The purpose of the PPM is to insure maximum public participation in the determination of the location and design of Interstate Highway projects.[40] To that end, it provides for two public hearings prior to the approval of a project by the Federal Highway Administration. The first is a "corridor public hearing" (location hearing), which is to be held before the "State highway department is committed to a specific proposal," while the second is a "highway design public hearing" (design hearing), which is to be held "after the route location has been approved, but before the State highway department is committed to a specific design proposal." [41]

[39] 23 C.F.R. Part 1, Appendix A (1970).

[40] Section 1 of the PPM provides as follows:

> a. The purpose of this PPM is to ensure, to the maximum extent practicable, that highway locations and designs reflect and are consistent with Federal, State, and local goals and objectives. The rules, policies, and procedures established by this PPM are intended to afford full opportunity for effective public participation in the consideration of highway location and design proposals by highway departments before submission to the Federal Highway Administration for approval. They provided a medium for free and open discussion and are designed to encourage early amicable resolution of controversial issues that may arise.
>
> b. The PPM requires State highway departments to consider fully a wide range of factors in determining highway locations and highway designs. It provides for extensive coordination of proposals with public and private interests. In addition, it provides for a two-hearing procedure designed to give all interested persons an opportunity to become fully acquainted with highway proposals of concern to them and to express their views at those stages of a proposal's development when the flexibility to respond to these views still exists.

[41] *Id.* § 4.

Section 6a of the PPM spells out the general conditions when both a location hearing and a design hearing must be held, or an opportunity for such hearings afforded:

> a. Both a corridor public hearing and a design public hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-aid highway project that:
>
> (2) Would have a substantially different
> (1) Is on a new location; or
> social, economic or environmental effect; or
> (3) Would essentially change the layout or function of connecting roads or streets.

Because the previous regulations of the Bureau of Public Roads provided only for a single public hearing on location, special provisions were made for those projects which were in the planning process at the time of the adoption of the PPM, and upon which a hearing had already been held. Since a public hearing was held on the Three Sisters Bridge project on November 24, 1964, it is this provision which we are primarily concerned with in this case. Section 6d of the PPM provides as follows:

> d. With respect to a project on which a hearing was held, or an opportunity for a hearing was afforded, before the effective date of this PPM, the following requirements apply:
>
> (1) With respect to projects which have not received location approval:
>
> (a) If location approval is not requested within 3 years after the date of the hearing or an opportunity for a hearing, compliance with the corridor hearing requirements is required unless a substantial amount of right-of-way has been acquired.
>
> (b) If location approval is requested within 3 years after the date of the hearing or an opportunity for a hearing, compli-

ance with the corridor hearing requirements is not required.

(2) With respect to those projects which have not received design approval:

(a) If design approval is not requested within 3 years after the date of the hearing or an opportunity for a hearing, compliance with the design hearing requirements is required.

(b) If design approval is requested within 3 years after the date of the hearing or an opportnuity for a hearing, compliance with the design hearing requirements is nevertheless required unless the division engineer finds that the hearing adequately dealt with design issues relating to major design features.

At an earlier stage in this case the defendants contended that the PPM was not applicable to the Three Sisters Bridge project because it was adopted after the enactment of § 23 of the 1968 Highway Act which included the direction to build the bridge. This position was expressly rejected by the Court of Appeals, which stated that "we see no reason not to apply these regulations to this case." [42] Because different issues are

[42] D. C. Federation of Civic Associations, Inc. v. Volpe, No. 23,870 (D.C.Cir. April 6, 1970). Slip op. at p. 23. The Court of Appeals went on to explain what it felt were the issues before this Court on the remand with respect to the PPM:

> These regulations apply to all projects which had not received both location and design approval from the Department of Transportation before the effective date of the regulations. Appellees assert that approval of the final location of the Bridge was obtained before that date. The accuracy of that assertion will be for the District Court to determine. However, appellees concede in their briefs that there has been no design hearing on the Bridge and that approval of the final design was not obtained before the regulations became effective. The regulations provide in § 6(d) (2) (b)

raised regarding compliance or noncompliance with the requirements of § 6d as to location and design hearings, this Court will discuss them separately.

I. LOCATION HEARINGS

The provisions of the PPM quoted above present two sets of standards to guide the Court in its determination as to whether a new location hearing need be held. Section 6a provides for a new location hearing if any of the three criteria are met. On the other hand, § 6d provides that for projects such as this where a public hearing has been held prior to the adoption of the PPM, the location hearing requirement is met if (1) location approval has been given

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If design approval is requested within 3 years after the date of the hearing, compliance with the design hearing requirements is nevertheless required unless the division engineer finds that the hearing adequately dealt with design issues relating to major design features.

It may be that design approval was not requested before the end of the three-year period (*see* 23 C.F.R. Part 1, Appendix A, § 6(d) (2) (a)), or that, as appellees concede, the division engineer has not made the finding required by the regulation quoted above, or that even if the division engineer has made the required finding, the record will not support that finding. In any such case of non-compliance, the Bridge cannot proceed until design hearings which conform to the regulations have been held.

We have discussed the requirements of the hearing regulations with specificity because that issue has been clearly raised by the parties. We do not, however, confine the scope of the remand hearing to the question of compliance with those regulations. If the District Court finds that appellees have not complied with any provision of Title 23 (including the regulations contained in 23 C.F.R. Part 1, Appendix A), the District Court should enjoin further action on the Bridge project until appellees have complied with all such provisions.

prior to the effective date of the PPM, (2) location approval is requested within three years of the hearing, or (3) even if location approval is not requested within three years, if a substantial amount of the right of way has been acquired.

The Court believes that these two sections should be read together as its guide. The criteria established in § 6d should be the Court's primary guide since they apply specifically to projects upon which a hearing has been held. But the general standards of § 6a can be interpreted consistently with § 6d. That is, this Court must first determine if location approval was given to the project before the effective date of the PPM or if location approval was requested within three years of the hearing. Then the Court must review that approval or request to determine if the location approved or requested to be approved is a new or different location from that considered at the 1964 hearings, or if it would have an essentially different effect on connecting streets from that considered at the 1964 hearings.[43]

There is no real dispute between the parties as to whether location approval was given prior to the effective date of the PPM, thereby bringing this project in compliance with § 6d(1) of the PPM. In September, 1966, the District of Columbia Department of Highways and Traffic requested from the Bureau of Public Roads' Division Engineer, Mr. Hall, approval to proceed with the preliminary engineering for survey and plan preparation for a new Central Potomac crossing from Spout Run on the Virginia side to the District of Columbia shore in the vicinity

[43] There is no allegation by the plaintiffs that the presently planned project would have a substantially different social, economic or environmental effect than the project as considered at the 1964 hearings.

of Foxhall Road. (Plaintiffs' exhibits 34, 35). These requests were accompanied by a map showing the location of the bridge as presently planned. (Plaintiffs' exhibit 33). On September 21, 1966, Mr. Hall granted the requested approval. (Plaintiffs' exhibit 36). Although there is considerable controversy over the meaning of these documents with respect to design approval, there is no question that they constituted the request for and the grant of approval for the preparation of contract plans for the project at the location where construction is presently going forward.

If § 6d is considered the sole criterion for this Court's review as to whether there has been compliance with the PPM, the above determination would be conclusive as to the location hearing requirement. But as discussed above, the more reasonable interpretation of the PPM requires that this Court make a further review to insure that § 6a has been complied with. The Court must therefore decide whether the location approved by Mr. Hall in September, 1966, is a new location as compared with those considered at the time of the 1964 hearings or if the present location will have a substantially different effect on connecting streets than the plans considered at the 1964 hearings.

The public hearing which was held in November, 1964, was based on a location study prepared by the consulting engineering firm of Howard, Needles, Tammen and Bergendoff.[41] The Howard Needles Report was prepared at the request of the District of Columbia Department of Highways and Traffic and was based on the assumption that an additional Central Potomac crossing was needed. The Report sets forth

[41] Plaintiffs' exhibit 10, hereinafter referred to as the Howard Needles Report.

three alternative locations for satisfying that need by means of a new bridge. Plan I is for a bridge downstream from Key Bridge in the vicinity of Theodore Roosevelt Island. Plan II provides for a bridge crossing the river at approximately a 45 degree angle approximately 1,000 feet downstream from the Three Sisters Islands. Plan III called for a bridge approximately 2,400 feet upstream from the Three Sisters Islands in the vicinity of the Georgetown Reservoir.

The Howard Needles Report was made available to interested persons prior to the hearing and its conclusions were explained at great length by a partner of the firm at the commencement of the hearing. The transcript of the 1964 hearings is in evidence in this case (defendants' exhibit 7), and the Court has read it in its entirety. The majority of the witnesses voiced their opposition to any New Central Potomac crossing, although some did comment on the merits of the alternative proposed plans.

There is no question that the present bridge project is not going forward at any of the locations proposed in the Howard Needles Report. The present plans call for a crossing perpendicular to the river upstream from the proposal in Plan II of the Report by approximately 1,500 feet on the District of Columbia shore and 950 feet on the Virginia shore. In determining whether this change in location is sufficiently substantial to require that a new hearing be held the Court is guided primarily by the PPM itself. As discussed above, the purpose of the PPM is to insure public participation to the maximum extent possible in the selection of the location and design of Interstate Highway projects. To this end, the location hearing is required to be held prior to the selection of a definite location by the state highway department in order that views expressed by the public as to the proposed

location and any possible alternatives may have some effect on the ultimate selection of the location of a project.

It appears to the Court that the PPM contemplates that minor changes in the proposed location may be made by the state highway officials after the public location hearing, perhaps in response to proposals and suggestions made at the hearing. If this change is so substantial as to amount to a new location that the public has not had the opportunity to comment upon, a new location hearing would be required by the PPM prior to any final commitment to the new location. The Court feels, however, that a reasonable reading of the PPM is that if the change is so insubstantial that the public would not be affected any differently than by the original proposal which formed the basis for the first hearing, then the change can be made without the necessity of going through the formality of a new hearing to allow the public the opportunity to express the same views that it did at the previous hearing. Therefore in determining what is a "new location" within the meaning of § 6a(1) of the PPM; the crucial considerations are: (1) whether the proposed change in location affects the public in such a way that certain members of the public, who were not affected by the proposal which served as the basis for the first hearing, would be affected by the new proposal and therefore should be given an opportunity to air their views at a new hearing; and (2) whether members of the public who were on notice of the effect of the first proposal with respect to their interests and therefore were given an opportunity to present their views at the first hearing, would have substantially different views to present on the new proposal.

Applying these principles to the present case, this Court concludes that the present location of the Three Sisters Bridge, although not identical with any of the proposals in the Howard Needles Report which served as the basis for the 1964 hearing, is not a "new location" within the meaning of § 6a(1) of the PPM. The 1964 hearing afforded the public an opportunity to comment on three proposed crossings in the area from just upstream from Theodore Roosevelt Island to the Georgetown Reservoir. The bridge presently under construction is within this area and is only from 950 to 1,500 feet upstream from one of the alternatives in the Howard Needles Report. The Court cannot conceive how any members of the public would be affected differently by the present location than by one of the three proposed in the Howard Needles Report. Important to keep in mind in this respect is the fact that under the present plans, no private property will be taken for the bridge or its ramps and interchanges. (Tr. 1397). The Court concludes that the Howard Needles Report gave notice to all interested citizens who might be affected by a new crossing at any of the three alternatives therein or at any point in between. The list of participants at the hearing supports this conclusion.[45] The fact that

[45] A partial listing of the organizations which were represented at the 1964 hearing indicates that all persons who might be affected by a new bridge at any location in the area covered by the Howard Needles alternatives were given the opportunity to present their views on the proposed crossing: Arlington County Cultural Heritage Commission; Georgetown Canal and Riverside Council; Arlington County Board; Georgetown University; North Highland Citizens Association, Virginia; Committee of 100 on the Federal City; Fairfax County Chamber of Commerce; Cathedral Heights—Cleveland Park Citizens Association, Washington, D.C.; Arlingtonians for the Preservation of the Potomac Palisades; Northwest Committee for Trans-

the majority of those appearing at the hearing chose to discuss the question of whether any new bridge was necessary does not affect this conclusion. All that is required by the PPM is that the public be given the opportunity to present their views as to the location of the project. If those appearing at the hearing choose not to do so, this is of no consequence to the decision that there has been compliance with the PPM location hearing requirement.

The principal difference between the presently planned bridge project and those considered at the 1964 hearings is not the result of the insubstantial change in the location of the bridge, but rather is a consequence of the change in the design of the ramps and interchanges providing access to the bridge, and the effect these changes have on the layout and function of connecting streets. The project as now planned will have a somewhat different effect on connecting streets. Plan II of the Howard Needles Report, which is the closest alternative to the presently planned project, provided for a direct connection between the bridge and MacArthur Boulevard and Foxhall Road, two main arteries in Northwest Washington. (Plaintiffs' exhibit 10, p. 33; Tr. 523). It also provided that traffic from these two arteries headed for downtown Washington would have access to the new Potomac River Freeway. Although at present the planning for the ramps and interchanges for the bridge has not been completed, the present plans provide for no direct access to and from the bridge or the Potomac

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portation Planning; Parkway Citizens Association, Virginia; Palisades Citizens Association, Washington, D.C.; Arlington County Civic Federation; Arlington Citizens Association; D.C. Federation of Civic Associations, Inc.; Arlington Council of PTAs; Citizens Association of Georgetown; Shepherd Park Citizens Association, Washington, D.C.; Arlington Chamber of Commerce.

River Freeway and MacArthur Boulevard and Foxhall Road. (Tr. 527, 1517). In view of the fact that the present Whitehurst Freeway will become the westbound lanes of the Potomac River Freeway, this means that traffic from MacArthur Boulevard and Foxhall Road would be forced to use M Street in Georgetown both to attain access to the Three Sisters Bridge and to get to downtown Washington. (Tr. 546, 1517).

It should be noted that the location and design of the Potomac River Freeway are not issues in this case. The fact that no means of ingress or egress are provided between the Freeway and the MacArthur-Foxhall area is not a factor in considering the effect of the Three Sisters Bridge on connecting streets. The issue raised by the plaintiffs of the necessity of using M Street to get from the MacArthur-Foxhall area to downtown Washington under present plans for the Freeway does not involve the bridge or its ramps and interchanges and is therefore irrelevant to this action.[46] Therefore the only issue before this Court is whether the decision to delete the direct access between MacArthur Boulevard and Foxhall Road and the bridge "essentially change(s) the layout and function of connecting roads and streets," and if it does

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[46] Unless Northwest Washingtonians heading for the downtown area would choose to go by way of Virginia, which is a highly implausible choice.

There was evidence at the trial that because there would be no direct connection between Key Bridge and the Potomac River Freeway, that the nature of Key Bridge would be changed, in that it would be rendered primarily a local crossing between Rosslyn and Georgetown. (Tr. 1519). While this is certainly an essential change in the function of Key Bridge, this change is caused by the plans for the Potomac River Freeway, not the Three Sisters Bridge, and it is therefore also irrelevant to this action.

whether this requires that a new location hearing be held before construction may proceed.

Plaintiffs emphasize that the present plans for the interchanges, by deleting the connection with the MacArthur-Foxhall area for the Three Sisters Bridge, will result in a substantial increase in traffic on already overburdened M Street in Georgetown. The Court does not believe that a sufficient showing has been made that the bridge as now planned will so essentially change the layout and function of connecting streets and roads as compared with the 1964 proposals so as to require a new location hearing. The evidence is conflicting as to the effect which the presently planned interchanges will have on traffic on M Street. Traffic approaching the new bridge from MacArthur Boulevard or Foxhall Road might be required to proceed on M Street to 27th Street before gaining access to an approach for the bridge (Tr. 546), and a similar situation may exist for traffic crossing the bridge headed for the MacArthur-Foxhall area. (Tr. 524). But there is also evidence that the planned Palisades Parkway which will parallel the river from the Potomac River Freeway may alleviate this problem. (Tr. 1393–94).

In any event, even assuming that the presently planned interchanges will essentially change the layout or function of connecting streets, as compared with the 1964 proposals, the Court does not believe that a new location hearing would serve any useful purpose. The possible adverse effects to connecting streets is not the result of any change of the location of the bridge and/or the ramps and interchanges for the bridge. Rather, the possible changes in the nature and function of connecting streets is a result of changes in the design of the proposed interchanges. There is no evidence that an interchange providing a

direct connection between the bridge and the MacArthur-Foxhall area could not be constructed at the location at which the bridge is now planned as well as 1,500 feet downstream as proposed in Plan II of the Howard Needles Report. Therefore a new location hearing would serve no useful purpose. The design of the interchanges and ramps for the bridge is a more appropriate topic for public discussion at a design hearing, the need for which the Court will now discuss.

II. DESIGN HEARINGS

Prior to the adoption of PPM 20-8 in January, 1969, there was no requirement in the regulations under 23 U.S.C. § 128 for a separate design hearing. Therefore the provisions in the PPM for projects upon which a hearing had been held as of the effective date of the PPM are different for design hearings than they are for location hearings. [Compare § 6d(1) with § 6d(2)]. The Court of Appeals indicated that there are three factual issues which this Court must decide in its determination of whether the PPM requirements for a design hearing have been met: (1) whether design approval was requested within three years after the 1964 hearings; (2) whether the Division Engineer has made the finding that the 1964 hearings adequately dealt with design issues relating to major design features; and if he has made this finding, (3) whether the finding is supported by the record.[47] Since § 6d(2) applies only "to those projects which have not received design approval," a preliminary question which this Court must resolve is whether the Division Engineer had given the project design approval prior to the adoption of the PPM.

[47] D.C. Federation of Civic Associations, Inc. v. Volpe (D.C. Cir., decided April 6, 1970), Slip op. at p. 23, n. 54; see n. 42, *supra*.

This question was not enumerated by the Court of Appeals because of the defendants' concession in that Court that the *final* design of the project had not been approved prior to the adoption of the PPM.[48]

The resolution of the issues of whether design approval was requested within three years of the 1964 hearing or was given prior to the adoption of the PPM depends on the Court's finding as to the significance of the actions of the District of Columbia Department of Highways and Traffic and the Division Engineer in September, 1966. These actions are relied upon by the defendants to show that design approval was requested and granted at that time. As the discussion below indicates, Mr. Hall granted whatever the District requested at that time, so that if the request was for design approval, then design approval was granted at that time.

On September 21, 1966, Mr. Hall, acting on the basis of two letters from the District of Columbia Department of Highways and Traffic (plaintiffs' exhibits 34, 35), an attached map (plaintiffs' exhibit 33) and two program data forms (defendants' exhibits 3, 4), granted the District of Columbia authorization to proceed with "preliminary engineering for survey and plan preparation." (Plaintiffs' exhibit 36). This Court has found that by these documents, the District of Columbia requested and Mr. Hall granted location approval within the meaning of § 6d(1) of the PPM. The question now before the Court is whether the documents also amounted to a request for and a grant of design approval as that term is used in PPM § 6d(2).

The opinion of the Court of Appeals strongly suggests that "design approval" as used in the PPM is to be interpreted to mean approval of the final design

[48] *Id.*

for the project. In discussing the questions which would be before this Court in determining whether the PPM has been complied with, the Court of Appeals stated that "appellees concede * * * that approval of the *final* design was not obtained before the [PPM] became effective."[49] The Court then went on to list the three questions which are raised by § 6d(2) of the PPM. Plaintiffs argue that it may be inferred from this statement that the Court of Appeals interpreted "design approval" as approval of the final plans, specifications and estimates for the project. This interpretation appears reasonable to this Court. As discussed above, the purpose of the PPM is to insure maximum public participation in the selection of the location and design of Interstate Highway projects. Since the previous regulations provided only for a location hearing, the Court concludes that the PPM provides for a design hearing for those projects already in the planning process unless they had progressed to the point where the final plans had been prepared and approved. At this stage a design hearing would serve no useful purpose since a commitment would already have been made for the design of the project.

There is no question that approval of the final design, or approval of the plans, specifications, and estimates for the entire project, has neither been requested nor has it been granted. (Tr. 1097). Therefore, if the above interpretation of "design approval" is correct, as this Court believes it is, a design hearing is required by § 6d(2)(a) of the PPM and construction of the bridge cannot go forward until it has been held.

Even if this interpretation is incorrect in requiring approval of the final plans for the project, this Court

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[49] *Id.* (Emphasis supplied).

believes that the actions of the District of Columbia Department of Highways and Traffic and the Division Engineer, in September, 1966, did not constitute either the request for or the grant of design approval under any reasonable interpretation of the PPM. Mr. Hall himself has described his understanding of "design" as the "entire gamut from decision to start preparation [of] contract plans until a plan is put up to be bid by contractors." (Tr. 486–87, 1094). Mr. Hall described his action of September 21, 1966, in approving the preparation of contract plans as "a start of the design process." (Tr. 560).

The testimony of Mr. Hall establishes that in September, 1966, the District of Columbia was unsure of many important aspects of the bridge design. At that time no decision had been made as to what type of bridge and interchanges would be built (Tr. 558); what the appearance of the bridge would be (Tr. 559); and the preliminary plans were for a bridge with a single 850 foot span over the river with no piers in the river. (Tr. 559). Mr. Hall testified that at the time that he authorized the preparation of contract plans he did not have before him for consideration any drawings or engineering materials indicating design factors other than the map which was submitted by the District. (Tr. 557; plaintiffs' exhibit 33). No vertical alignment is shown on that map, although he testified that certain inferences about the vertical alignment could be drawn from the fact that the bridge shown went under the eastbound lanes of the George Washington Memorial Parkway and over the westbound lanes. (Tr. 559). It is also clear that Mr. Hall was considering only the bridge from abutment to abutment and not the ramps and interchanges in his actions at that time. (Tr. 1174).

An examination of the documents involved in the

September, 1966, action supports the plaintiffs' contention that design approval was neither requested nor granted at that time. The letter from Mr. Rivard, the Chief Engineer for Planning and Programming of the District highway department, to Mr. Hall, dated September 19, 1966 (plaintiffs' exhibit 34) states that it was submitted "in support of the request for approval for preliminary engineering" for three projects including a new Central Potomac River Crossing. The letter discusses several of the studies which had been made showing the need for a new bridge. While it alludes generally to design studies, it contains no specifics as to the design of the projects, and further states:

> The design of these facilities *will be developed* in such a manner as to allow traffic to approach and leave the facility efficiently. (Emphasis supplied).

The letter from Mr. Airis, the Director of the District highway department, to Mr. Hall, dated September 21, 1966, (plaintiffs' exhibit 35) does indicate that the bridge will have six lanes, but this is the only reference to a design feature. The letter concludes:

> Since these projects have now cleared the last major planning objectives, *I wish to proceed with engineering design.* I, therefore *request* your *approval of final location alignment* of these four projects * * *. (Emphasis supplied).

The map submitted with this letter, (plaintiffs' exhibit 33) indicates the horizontal alignment of the proposed bridge, the possible location of interchanges, and, as discussed above, gives rise to some inferences as to the vertical alignment of the bridge. (Tr. 558–59). In addition, the program data for the project, indicates that the bridge will be a six lane, controlled access facility, and gives the lengths for the spans as

the bridge was planned at that time. (Tr. 1199–1200; defendants exhibit 4).

The Court finds that the above documents do not constitute a request for design approval. While certain basic design features had been determined at that time, i.e., number of lanes, controlled access, and horizontal alignment, the Court does not believe that these features are a sufficient basis for a request for design approval as that term is used in the PPM. Mr. Airis' letter specifically states that what is being requested is "approval of final location alignment," and this is the only request in the letter. (Tr. 1288). From the evidence in this case, the Court concludes that this was the only approval which was requested at that time.

Since the Court finds that no design approval was requested, it cannot be said that any was granted by Mr. Hall's authorizing the District to proceed with the preparation of contract plans. The letter of authorization (plaintiffs' exhibit 36) contains no reference to any sort of approval being granted. This mere authorization for the District of Columbia to proceed with the development of plans for the bridge cannot be said to be sufficient documentation of design approval so as to render unnecessary compliance with the PPM design hearing requirement for this project.

The planning activities following the September, 1966, authorization support this finding that insufficient design work had been done on the project for design approval to have been requested or granted at that time. It was only after Mr. Hall's action in September, 1966, that the District, again with the approval of Mr. Hall, retained the consulting engineering firm of Howard, Needles, Tammen, and Bergendoff, to develop several alternative designs for the proposed bridge. (Tr. 567). Several alternative de-

signs were developed and submitted to the Fine Arts Commission, which in September, 1967, approved the design of the bridge which is presently to be built. (Tr. 573). In December, 1967, the Type, Size and Location (TS&L) Report for the project was forwarded by the Howard, Needles firm to the District of Columbia Department of Highways and Traffic, which in turn submitted it to Mr. Hall for approval. (Plaintiffs' exhibit 57; Tr. 1090). Mr. Hall has never approved the TS&L Report because of doubts as to the structural feasibility of the planned superstructure. (Tr. 574; plaintiffs' exhibit 85).

The Court concludes that the submission of the TS&L Report to the Division Engineer for approval is the first act which might be construed as a request for design approval within the meaning of the PPM. It was only at this time that design work had progressed to the point that it might have justified denial of the opportunity for a design hearing required by the PPM.[50] Since the TS&L Report has never been approved by the Division Engineer and was submitted

[50] The Court, however, adheres to its earlier expressed view that the PPM requires that approval be given to the final design before compliance with the design hearing requirement is obviated.

The Court recognizes that a TS & L Report is not required as part of the planning process for every Interstate Highway project. But the Court is not ruling that the submission of the TS & L Report is *per se* the first request for design approval within the meaning of the PPM. Rather, the Court is merely holding that, *on the facts of this case*, no request for design approval was made prior to the submission of the TS & L Report to the Division Engineer.

It should also be noted that Mr. Hall testified that at this time he is still uncertain as to the design of the ramps and interchanges for the bridge. (Tr. 526). In view of this fact, it is difficult to see how this part of the project could have been given any sort of meaningful design approval.

sometime in December, 1967, or thereafter, (Tr. 1090) the request for design approval was not made within three years of the November, 1964, hearings, and therefore a design hearing is required by §6d(2)(a) of the PPM before construction can proceed.

The defendants contend that this Court should accept the consistent and reasonable administration interpretation of the PPM that design approval is requested and granted at the time of the request for and grant of authorization to proceed with the preparation of contract plans. Mr. Hall testified that his interpretation of the PPM was that design approval was given at this time on the basis of the major design features which were certain at that time, such as number of lanes, construction standards, general horizontal and vertical alignment, and the type of structure to be built. (Tr. 1196–97). Mr. Turner, the Federal Higliway Administrator, testified that the nationwide interpretation is that design approval is given when major design features were known, and further defined such major design features as those "things that would have major effect on the community or factors which would need to be known in order to give instructions to an engineering firm to develop the blueprint plans." (Tr. 989). He further testified that normally this approval was granted at the time of the authorization to proceed with the preparation of contract plans. (Tr. 989). The defendants argue that this interpretation is reasonable in that the authorization by the Division Engineer for the preparation of contract plans is the natural point on the relationship between the Bureau of Public Roads and the state highway department for design approval to be given. This argument is based on the fact that it is the only formal approval required during the planning process

until the approval of the final plans, specifications, and estimates.

This Court is well aware of the deference which it must give to the interpretation of administrative regulations by the administrative officials who promulgate and enforce them. However, the presumption in favor of accepting the administrative interpretation of a regulation is not absolute. The interpretation must be within the bounds of reason and not inconsistent with the regulation itself. *See* Udall v. Tallman, 380 U.S. 1, 16–17, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965); Robertson v. Udall, 121 U.S.App.D.C. 218, 221, 349 F.2d 195, 198 (1965).[11]

The Court concludes that the interpretation proposed by the defendants is unreasonable and inconsistent with the terms of the PPM itself. As stated before, the purpose of the PPM is to insure maximum public participation on the selection of the location and design of Interstate Highway projects. In providing for projects upon which a hearing had been held prior to its effective date, the PPM takes into account that previously only one public hearing on the location of the project was required. Section 6d therefore provides more stringent criteria for exempting such a project from the design hearing requirement.

[11] The customary deference to an administrator's interpretation of his own regulation is somewhat negated in this case by the lack of evidence of any official interpretation prior to the commencement of this suit supporting the testimony of Messrs. Turner and Hall. In fact, the sole documentary evidence as to an official interpretation of the PPM indicates that there must be some "documentation clearly stating approval of the design." (Plaintiffs' exhibit 75). As discussed above, the Court finds that there is not sufficient documentation of design approval in this case. In addition Mr. Hall testified that he had never discussed the meaning of the PPM with any of his superiors in the Bureau of Public Roads, and thus his interpretation was his personal interpretation.

than from the requirement for a new location hearing. [Compare § 6d(2) with § 6d(1)]. One of the purposes of the PPM is to require a design hearing for any project, unless the planning for the project had progressed to such a degree that a hearing would be a useless formality because a commitment had already been made for the design of the project, or unless the previous public hearing dealt adequately with matters of design.

The interpretation proposed by the defendants is inconsistent with this purpose of the PPM. Under that interpretation, design approval can be given, and therefore the necessity of a design hearing avoided, at a time when only the barest minimum of the design features of the project are known. This interpretation also means that design and location approval are given at the same time and by the same act. This appears to the Court to be inconsistent with the separate provisions for design and location approval in the PPM. In view of these separate provisions, the PPM cannot be reasonably interpreted as providing that a request for design approval is included in a request for location approval such as in Mr. Ayris' letter of September 21, 1966, (plaintiffs' exhibit 35) or that the response to such a letter by the Division Engineer includes design approval.

In view of the foregoing discussion, the Court concludes that no request for design approval within the meaning of the PPM was made within three years of the 1964 hearings, nor was any design approval granted prior to the adoption of the PPM in January, 1969. Therefore, § 6d(2),(a) of the PPM requires that a new design hearing be held before construction work on the bridge may proceed any further.

This ruling renders moot the final two questions posed by the Court of Appeals decision, i.e., whether

the Division Engineer has made the finding required by §6d(2)(b) of the PPM that the 1964 hearings adequately dealt with design issues relating to the major design features of the project, and whether this determination, if made, is supported by the record. But, in the event that the above interpretation of the PPM is not accepted, this Court will discuss these two questions.

Mr. Hall testified that he made the required finding after skimming through the transcript of the hearing in the Summer of 1969. (Tr. 1130, 1168). He did not, however, make any record of this finding at that time. The only record of the finding is a memorandum, dated November 17, 1969, and signed by Mr. Hall, which purports to summarize his finding that the 1964 hearings complied with the requirement of §6d(2)(b) of the PPM. (Defendants' exhibit 6). For many of the same reasons which were discussed with relation to the Holmes Memorandum,[32] the Court finds that this memo is of little probative value on the question of whether Mr. Hall made the required finding. Although the Court notes the absence of a contemporaneous record of this finding, it finds that the plaintiffs have not carried their burden of proving that Mr. Hall did not make the required finding. The Court believes the testimony of Mr. Hall, a dedicated government employee with many years of service, and finds that he did make the required finding in the Summer of 1969.

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[32] See n. 31, *supra*. Like the Holmes Memorandum, this memo was prepared at the request of Mr. Reis, a Department of Transportation attorney engaged at the time in the defense of this suit. (Tr. 429). This request was made and the memo was prepared after the filing of the complaint in this action, which alleged noncompliance with the PPM. (Tr. 430). Mr. Hall knew of this suit at the time of the preparation of the memo. (Tr. 1293).

But the question of whether that finding is supported by the record is a more difficult one. A preliminary question is presented as to what is meant by "design issues relating to major design features" as that term is used in § 6d(2)(b) of the PPM. The defendants argue that the PPM does not define "design issues relating to major design features," but that the interpretation of the term is left to the discretion of the Division Engineer. They contend that the best guide in the PPM as to the meaning of the term is the listing in § 10b of "essential elements" which must be included in the design study report to be submitted to the Bureau of Public Roads with all new requests for design approval.[53] The elements listed correspond to the Division Engineer's interpretation of "design issues relating to major design features." (Tr. 1220).

The plaintiffs direct the Court's attention to § 4 of the PPM, which, in defining a "highway design public hearing," provides that it must afford the public the opportunity to comment on "major highway design features, including the social, economic, environmental, and other effects of the alternate designs." [§ 4b (3)]. The PPM goes on to list, in § 4c, twenty-three factors which are included within the meaning of the term "social, economic and environmental effects."[54] Plaintiffs argue that since these twenty-three

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[53] Section 10b(1)(b) of the PPM provides that a design study report must be submitted to the Bureau of Public Roads by the state highway department with all requests for design approval:

> (b) Design study reports must describe essential elements such as design standards, number of traffic lanes, access control features, general horizontal and vertical alignment, right-of-way requirements and locations of bridges, interchanges, and other structures.

[54] The twenty-three factors upon which the public must be given the opportunity to comment in any design hearing held

factors are included in the PPM definition of "major highway design features," they are also included within "design issues relating to major design features" as that term is used in § 6d(2)(b).

This Court concludes that the interpretation proposed by the plaintiffs is a more reasonable one. The PPM, in § 4, defines "major highway design features" to include the factors discussed above. The Court does not see any substantial difference between the terms "major highway design features" and "design issues relating to major design features." Therefore, the Court concludes that the latter term includes the same factors as the former, and that the Division Engineer's finding can be said to be supported by the record only if those factors were adequately dealt with at the 1964 hearings. Section 10 of the PPM, relied upon by the defendants, does not in any way deal with the design hearings required by the regulation, but rather is concerned with the information which

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on this or any other project, are as follows: (1) Fast, safe and efficient transportation. (2) National defense. (3) Economic activity. (4) Employment. (5) Recreation and parks. (6) Fire protection. (7) Aesthetics. (8) Public utilities. (9) Public health and safety. (10) Residential and neighborhood character and location. (11) Religious institutions and practices. (12) Conduct and financing of Government (including effect on local tax base and social service costs). (13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area). (14) Natural and historic landmarks. (15) Noise, and air and water pollution. (16) Property values. (17) Multiple use of space. (18) Replacement housing. (19) Education (including disruption of school district operations). (20) Displacement of families and businesses. (21) Engineering, right-of-way and construction costs of the project and related facilities. (22) Maintenance and operating costs of the project and related facilities. (23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

must be forwarded to the Bureau of Public Roads by a state highway department when it seeks design approval for a project. Therefore it does not appear as relevant to the question before this Court as does § 4, which provides the definition of a design hearing.[55]

The Court concludes that the Division Engineer's finding that the 1964 hearings "adequately dealt with design issues relating to major design features" is not supported by the record of the 1964 hearings for two reasons. The first is that the project as proposed at the 1964 hearings is of a substantially different design than the project which is presently planned. The second is that the 1964 hearings did not deal with several of the major design features of the project as that term is used in the PPM.

The Court adheres to the same position regarding the changes in the design of the project following the public hearing that it set forth with regard to changes

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[55] Defendants argue that this interpretation will produce the "absurd" result of applying a more stringent standard to the determination of the sufficiency of hearings held prior to the PPM than to new design hearings. This is based on the fact that new design hearings must merely afford the public the opportunity to comment on the factors enumerated in § 4c, while § 6d(2)(b) requires that the Division Engineer find that the factors were in fact adequately dealt with in the prior hearing.

The Court agrees that this is the result of its ruling, but it does not feel that it can be characterized as "absurd" in light of the purpose of the PPM to insure maximum public participation in the selection of the location and design of Interstate Highway projects. The Court believes that the PPM should be interpreted as favoring a design hearing on projects already planned at the time of its adoption unless such hearings would be a useless formality. Therefore it seems reasonable to apply a more stringent standard to hearings held prior to the effective date of the PPM when there was no requirement for a design hearing.

in location. That is, that the PPM contemplates that changes in design may be made after the hearing, perhaps as a result of suggestions received at the hearing, without the necessity of holding another design hearing. A new hearing is required only in those instances where the changes are so substantial that they amount to a new design and therefore the public should be given an opportunity to comment. The Court, however, reaches a different conclusion in applying these criteria to the design of the project than it did as to the location. The Court finds that the present design of the bridge is so substantially different from that proposed in 1964, that the public should be given an opportunity to present their views on the project as presently planned.

The basis for the 1964 hearings on the Three Sisters Bridge project was the Howard Needles Report. This Report was primarily concerned with the discussion of several possible locations for the proposed Central Potomac crossing, but some design features were discussed. At several instances during his testimony, Mr. Hall testified that the presently planned bridge is a different bridge from that proposed for Plan II in the Howard Needles Report. He testified that the present bridge was not considered at the 1964 hearings, and as an explanation added that the present bridge is a "different type bridge" at a slightly different location from that shown in the Howard Needles Report. (Tr. 542–43). Upon examination by government counsel, Mr. Hall stated that "the bridge that is being designed was not considered at the public hearing." (Tr. 1274).

Several significant differences between the design of the bridge considered at the 1964 hearings and the presently planned bridge have been raised. Plan II of the Howard Needles Report called for a bridge cross-

ing the river at a forty-five degree angle, while the present plans provide for the bridge to be constructed at right angles to the river. (Tr. 515). Therefore the horizontal alignment of the present project was not considered at the hearing. Plan II provided for a tunnel through the Virginia palisades, while the present plans avoid the need for a tunnel by using the Spout Run valley for the Virginia approaches to the bridge. (Tr. 515). Different parkland and a different quantity of parkland will be used for the present project. (Tr. 515–16.) The bridge design pictured in Plan II included approach ramps over the river itself and the approaches infringed on the Glover-Archbold Park. The present plans call for the ramps to be built over the land with no incursion into the park. (Tr. 516). The Howard Needles proposal is for a bridge with several short spans and several piers in the river, while the present plans call for one long main span crossing the river supported only by two piers. (Tr. 522). The present plans delete the direct access between the bridge and MacArthur Boulevard and Foxhall Road, which was provided in Plan II. (Tr. 524). And last but not least, the cost of the present project is estimated at twenty million dollars as compared with an estimate of six million in 1964. (Tr. 515, 1180–82).

In view of these differences between the project as presently planned and the proposal considered at the 1964 hearings, the Court concludes that the public has not had the opportunity to comment on the major design features of the presently planned project, and therefore the Division Engineer's finding under § 6d (2)(b) of the PPM is not supported by the record.

There was also considerable testimony to the effect that several of the factors listed in § 4c of the PPM were not considered at the 1964 hearings. (Tr. 1171–

88). The Court has ruled that "design issues relating to major design features" include these factors. Therefore the fact that these factors were not considered for the project as presently planned at the 1964 hearings also renders the Division Engineer's finding unsupportable by the record.

23 U.S.C. § 128(a)

This section provides as follows:

> (a) Any State highway department which submits plans for a Federal-aid highway project involving the bypassing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed location of such highway.

The responsibility for making the certification called for in this section has been delegated to Mr. Sheaffer, the Chief of the District of Columbia Department of Highways and Traffic's Office of Engineering. The certification was made in two letters from Mr. Sheaffer to Mr. Hall, the Bureau of Public Roads Division Engineer. (Plaintiffs' exhibits 88, 96). The first letter dated August 29, 1969, certifies that

public hearings had been held and that the department had considered the economic effects of the project. In a letter dated October 9, 1969, Mr. Sheaffer supplemented this certification by stating that the highway department had considered not only the economic effects of the bridge, but also its social effects, its effects on the environment, and its consistency with such urban planning as has been promulgated by the community. The first certification was based on the requirements of § 128(a) as they existed prior to 1968, while the supplementary certification was prepared for the purpose of complying with the section as amended by § 24 of the Federal-Aid Highway Act of 1968.

The plaintiffs contend that the certifications are invalid because they were not made by Mayor Washington, the official who is required by this statute and Title 7 of the D.C. Code to make the certification. This is the same argument that is raised in connection with § 103. For the reasons stated in the Court's ruling on that section, *infra*, this argument is rejected as insufficient to establish non-compliance with § 128.

The first certification required by § 128(a) is that public hearings have been held or the opportunity for public hearings afforded. This Court has ruled that the District of Columbia has not held the public design hearings required by the Department of Transportation Policy and Procedure Memorandum 20-8, the hearing regulation implementing § 128(a). Therefore, the certification that the public hearings have been held as required by § 128 is not supported by the record, and must be set aside.

The plaintiffs contend that the certifications must be set aside as arbitrary and capricious in that Mr. Sheaffer, the official who made the certifications, did not know if adequate consideration had been given

within the highway department to the factors included in the certification. Mr. Sheaffer testified that all matters pertaining to planning and the consideration of the economic, social, and environmental effects of highway projects are carried on by the highway department planning staff before a project was submitted to his division within the department. (Tr. 457). Therefore he could not say of his own personal knowledge what specific economic, social or environmental effects of the proposed bridge project had been considered by the department at the time of his certification, (Tr. 433–34) or how the project was consistent with local urban planning. (Tr. 435). He stated that he was confident that the planning staff of the department had considered all of the requirements of the statute. (Tr. 434, 458). But the basis of his confidence was not any personal knowledge that the statutory requirements had actually been complied with, but his assumption that all of the required factors had been taken into consideration in order for the project to have progressed to the stage of submitting construction plans to the Bureau of Public Roads for approval. (Tr. 458).

The Court recognizes that § 128 requires that the certification be made by the state highway department rather than by any specific individual. If the certification requirement is to be given any effect, however, the certificate should be made by an official who has some knowledge of the actions to which he is certifying. Of course, no one individual within the department would have considered all of the requirements of the section personally, but the certifying officer should be one who knows as a fact that the actions to which he is certifying have been taken. In this case, Mr. Sheaffer relied on his assumption that all of the required effects had been considered merely because

the project had reached the stage where the certification is normally made. The Court finds that this assumption is an insufficient basis for the certification.

The plaintiffs also contend that the certification that the project was consistent with the goals and objectives of such urban planning as has been promulgated for the community is not supported by the record because of the National Capital Planning Commission comprehensive transportation plan which did not include the Three Sisters Bridge. This is the same argument that was raised in connection with § 134. For the reasons stated in the Court's ruling on that section, *supra*, the Court rejects this contention.

23 U.S.C. § 109(a)

This section provides as follows:

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives and to conform to the particular needs of each locality.

The duties imposed on the Secretary of Transportation by this section have been delegated to the Bureau of Public Roads' Division Engineer for the area in which the project is to be constructed. The question before the Court in determining whether there has been compliance with § 109 for the Three Sisters Bridge project is whether the Division Engineer for the District of Columbia, Mr. Hall, in approving certain plans and specifications for preliminary construction for the bridge, reasonably con-

cluded that the facility would satisfy traffic needs "in a manner conducive to safety, durability and economy of maintenance."

On September 2, 1969, Mr. Hall approved the plans, specifications, and estimates for the construction of the piers for the Three Sisters Bridge, which had been submitted to him by the District of Columbia Department of Highways and Traffic earlier that day. (Plaintiffs' exhibits 89, 90). This approval was, in effect, an authorization to begin construction of the piers. The District then proceeded to advertise for bids for the construction of the piers, and later that month awarded a contract for preliminary construction work on the piers.

The plaintiffs contend that Mr. Hall's approval of the plans, specifications and estimates for the construction of the piers violated § 109 in that at the time of the approval there were unresolved problems relating to (1) the foundation conditions at the bottom of the river at the bridge location, (2) the structural feasibility of the planned design of the bridge superstructure, and (3) the possible adverse effects to health of any increase in air pollution which might be caused by the bridge.

The Court does not believe that the problems which have developed regarding the condition of the river bed at the bridge site are such as would render Mr. Hall's approval of the preliminary construction plans violative of § 109. Before the construction of a bridge, it is necessary to make extensive investigations of subsurface conditions to determine if they are sufficient to support the foundations for the bridge piers. This is done primarily by means of borings "to determine the elevation * * * and the character of the base rock." (Tr. 602). At the time Mr. Hall approved the plans, specifications and estimates for the pier construction, these borings had not been completed.

and subsequently problems developed so that the plans for the project had to be modified. (Tr. 603). But Mr. Hall emphasized that there is no question that the piers can be built to support the bridge as presently planned. (Tr. 603). He explained that preconstruction boring and other testing of the subsurface is not conclusive, and that it is only after the commencement of the actual excavation for the pier foundations that the engineers can be certain that subsurface conditions are sufficient to support the piers. (Tr. 604). In view of the above, the Court concludes that the fact that Mr. Hall was not certain of the subsurface conditions at the time when he approved the plans for the construction of the piers does not render that approval inconsistent with the requirements of § 109.

Similarly, the Court is not convinced from the evidence in this case that the possible air pollutional effects of the bridge project represents a sufficient hazard to the health and safety of highway users to justify a finding by this Court that the defendants are required to undertake a study of such effects before the responsible official of the Department of Transportation may make the finding required by § 109 that the project is safe as planned.

A more serious problem is raised by the question of whether the bridge project as presently planned is structurally feasible. Structural feasibility, i.e., whether the planned bridge can be built so that it will stand up under normal use, is certainly an element which must be considered by the Division Engineer and by this Court in determining whether the § 109 requirement has been met. The bridge as presently planned will consist of abutments on the District and Virgin[illegible] shores, with a span from each of these abutments to a pier located a short distance from each shore, and a long 750 foot span between the two piers. The bridge will be a prestressed concrete box girder

structure, having the appearance of a flat arch. This design was among those developed by the consulting engineers in their Type, Size and Location Report prepared in 1967 (plaintiffs' exhibit 57), and has been approved by the Fine Arts Commission. (Plaintiffs' exhibit 54; Tr. 573). The bridge is of a type not previously used extensively in this country, and the 750 foot main span will make it the longest prestressed concrete bridge of its type in the world (Plaintiffs' exhibit 69).

The evidence in this case indicates that the structural feasibility of the presently planned bridge was a matter of great concern among officials of the Federal Highway Administration prior to Mr. Hall's approval of the plans for pier construction in September, 1969, and that it remains an unresolved question. In September, 1968, Mr. Wilkes, the Chief Bridge Engineer of the Bureau of Public Roads, noted his concern with both the structural feasibility and the appearance of the proposed bridge design, and suggested that a comprehensive feasibility study and model testing be undertaken before a final commitment was made to the design.[56] Mr. Turner, the Fed-

[56] A memorandum from W. J. Wilkes to August Schofer, Regional Federal Highway Administrator, September 6, 1968 (plaintiffs' exhibit 69), includes the following statements:

> The proposed prestressed concrete box girder bridge design with curvature on each end is a type of design and construction that has not been used extensively in this country. Several bridges of this type but of shorter main span length have been designed and constructed in European countries. A comprehensive feasibility study should be conducted which would take into account the effect of the curvature of the end spans and skew of the abutments. The study should be refined to a point where firm dimensions are established and required strength of the concrete determined.

* * * * * * *

eral Highway Administrator, testified that he concurs in these views: (Tr. 923). In late 1969, he requested additional feasibility studies and model testing by the District of Columbia Department of Highways and Traffic. (Tr. 605, 609–10). He has also sent a delegation of engineers to Europe to study bridges of similar types there, (Tr. 918).

Mr. Turner expressed his continuing concern in a memorandum to Mr. Schofer, the Regional Federal Highway Administrator, in March 1970 (plaintiffs' exhibit 113):

> In our memorandum of September 6, 1968, we requested that a comprehensive feasibility study be made for the proposed design which would take into account the effect of the curvature of the end spans and skew of the abutments. We are still concerned that the combination of the adverse geometry of the superstructure, the unconventional design details, the extreme lack of design experience of a structure of this type and the complete absence of this particular construction experience in this country make the undertaking *extremely hazardous and fraught with danger*. To the best of our knowledge, very

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We are gravely concerned over the massive appearance of the bridge which is equivalent in height to a six-story building at the two rivers piers. The bridge is horizontally curved on each approach span so that the concave fascia girder must be warped in a third dimension. We strongly recommend that scale models of this bridge and adjoining structure be prepared and studied before final commitment is made for this type structure. As an absolute minimum, additional sketches should be prepared to show that the effect of the massive box girder bridge fore-shortened as viewed from each river bank and from the Key Bridge crossing. The proposed design violates many of the desirable principals of highway structure contained in the recent publication "The Freeway in the City."

little has been accomplished to alleviate this concern. The 1968 Federal-Aid Highway Act directs the construction of certain projects within the District of Columbia including the Three Sisters Bridge, I-266 crossing of the Potomac River. Such construction was to be undertaken as soon as possible and "shall be carried out in accordance with all applicable provisions of Title 23 of the United States Code." Section 109 of Title 23, CFR, requires that

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) *that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability and economy of maintenance;* (2) that will be designed and constructed in accordance with standards best suited to accomplish the foregoing objectives, and to conform to the particular needs for each locality.

At the meeting in my office on March 20, 1970, an agreement was made with Mr. T. F. Airis, Director of the Department of Highways and Traffic, that a feasibility study would be initiated to determine the proper cross section design for the bridge. In addition to the design proposed by the District of Columbia, one or more of a conventional cross section would be included in the investigation. As a second phase of the investigation, it was agreed that a scale model of the section determined to provide the optimum of engineering and aesthetic properties would be constructed at a scale of about $\frac{1}{15}$ for the purpose of load testing in order to verify the various design assumptions that must be made by the designer. However, the model testing phase will not be started until this office is satisfied that the cross section to be tested will

provide the safety, durability and economy of maintenance that is required by Section 109 of Title 23, CFR. (Emphasis supplied).

The view that the project is "extremely hazardous and fraught with danger" was reiterated by Mr. Hall himself in a letter dated April 2, 1970, to Mr. Airis, the Director of the District of Columbia Department of Highways and Traffic. (Plaintiffs' exhibit 114).

The Court has no reason to doubt the repeated assurances from various Department of Transportation officials that the bridge that will ultimately be built at the Three Sisters location will be a safe bridge. These officials emphasized that the Department does not build bridges which are not structurally feasible. (Tr. 613–14, 804, 920). But the issue before the Court is not whether the bridge that is *ultimately built* will be structurally sound, but whether the *present plans* for the project were sufficient to justify Mr. Hall's approval of the pier construction in light of the § 109 requirement that the project provide for traffic needs "in a manner conducive to safety, durability and economy of maintenance." The Court concludes that Mr. Hall could not have made a rational finding that the bridge project *as presently planned* satisfies the § 109 requirement because of the uncertainty shared by several Federal Highway Administration officials, including Mr. Hall himself, as to the structural feasibility of the project as presently planned.

As discussed above, the District of Columbia Department of Highways and Traffic has been requested by the Federal Highway Administration to conduct feasibility tests and to prepare models of the proposed bridge for further testing. Until these tests are completed, it cannot be determined whether the presently planned bridge can be safely built. If these tests show

that the present design is not structurally feasible, it will be necessary for a different type of bridge to be built. (Tr. 616). Therefore, the Court finds that it was unreasonable for the Division Engineer to approve the expenditure of public funds on the preliminary construction stages when he was uncertain that the project as planned would ever be completed. Mr. Hall himself stated that in his thirty-five years with the Bureau of Public Roads he had authorized construction to begin on a bridge before he was certain that the planned facility was structurally feasible on only one occasion. (Tr. 620).

It is true that the plans, specifications and estimates which Mr. Hall approved in September, 1969, were only for construction of the piers of the bridge, and the approval form specifically provided that the "superstructure type [was] not yet determined." (Plaintiffs' exhibit 90). The plans, specifications and estimates for the superstructure have not yet been finalized, and it is in the process of their preparation that the feasibility tests are being carried on. But the Court feels that § 109 prohibits the approval of the final plans and specifications and the commencement of construction for any integral part of a highway facility in a situation where the responsible officials have reservations as to the structural feasibility of the entire facility as planned. If § 109 is to be given any effect, it must be interpreted as prohibiting the approval of construction of such an integral part of a highway facility as the piers of a bridge at a time when the responsible officials are concerned that the planned facility is "extremely hazardous and fraught with danger."

The Court therefore holds that § 109 requires that, prior to approval of the plans and specifications for

any integral part of a highway facility, the planning for that facility must have proceeded to a sufficient degree for the responsible officials to determine that the planned facility is structurally feasible. The Court further holds that the approval of the plans, specifications and estimates for the construction of the piers for the Three Sisters Bridge was not in compliance with the requirement of § 109. This approval is therefore set aside and the Division Engineer is enjoined from approving the plans and specifications for any part of the bridge facility until the responsibile officials are convinced that the entire facility as planned is structurally feasible, and will therefore serve the transportation needs of the area "in a manner conducive to safety, durability and economy of maintenance."

23 U.S.C. § 134

This section provides as follows:

> It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are

> based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section.

The crucial finding required by this section, i.e., that the proposed project is "based on a continuing comprehensive transportation planning process carried on cooperatively by states and local communities," has been delegated by the Secretary of Transportation to the Bureau of Public Roads' Division Engineer, in this case Mr. Hall. Mr. Hall testified that he made the required finding in August or September, 1969, as part of his decision to authorize the commencement of construction of the piers for the bridge. (Tr. 1107). The finding was not committed to writing but Mr. Hall testified that he did discuss it with his staff. (Tr. 1109–10). The finding was based on the approval and continuing review of the Three Sisters Bridge project by the Transportation Planning Board (TPB) of the Metropolitan Washington Council of Governments (COG). (Tr. 1108).

The plaintiffs contend that the Division Engineer's finding is arbitrary and capricious in that it is not supported by the actual status of transportation planning in the Washington metropolitan area. The basis of the plaintiffs' argument is that the comprehensive transportation plan promulgated by the National Capital Planning Commission (NCPC) in December, 1968, specifically "rejects the Three Sisters Bridge * * * as being both unnecessary and undesirable." (Plaintiffs' exhibit 71, p. 19). The plaintiffs argue that since this is the only actual transportation plan which has been published for the Washington area, it cannot be reasonably said that the Three Sisters Bridge is "based on a continuing comprehensive transportation planning process."

The COG is an organization created by the District of Columbia, and several of the local jurisdictions in Maryland and Virginia in the metropolitan area to provide for area wide approaches to common problems. The TPB is the transportation planning arm of the COG. The TPB has never published a transportation plan for the area as such, and it is currently in the process of preparing such a plan. (Tr. 1311). But it has reviewed the transportation needs of the area and proposals for new facilities to satisfy those needs since its inception. (Tr. 1312–13). In December, 1967, the TPB formally approved the Three Sisters Bridge as "consistent with comprehensive planning in the region." (Defendants' exhibit 11).[57] There is evidence that the TPB has continuously reviewed the transportation system for the area and that the approval of the Three Sisters Bridge has never been rescinded. (Tr. 1283).

Mr. Hall testified that he regarded the NCPC plan as relevant to his finding under § 134, (Tr. 496) but he did not feel that the fact that the plan did not include the Three Sisters Bridge negated his finding in that he regarded the TPB to be the primary agency to which he should look in making his finding. He based this conclusion on the fact that § 134 calls for cooperative planning on a region wide basis and the fact that the NCPC is concerned with planning solely for the District of Columbia, while the TPB is a regional organization.

[57] It is true that this approval was in response to a submission of the project for approval under the Demonstration Cities and Metropolitan Development Act of 1966, [42 U.S.C. § 3334 (Supp. V, 1970)]. But there is no requirement in § 134 that a project be given specific formal approval under that section by any group. The project must merely be based on the transportation planning process for the area.

The Court concludes that the finding of the Division Engineer that the bridge project is "based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities" was reasonable and was supported by the status of transportation planning for the Washington metropolitan area. The Court finds that, while the transportation planning activities of the NCPC are certainly relevant to the status of the transportation planning process for the metropolitan area, the primary planning unit for the cooperative planning called for in § 134 is the TPB. The NCPC has statutory responsibilities only as to the District of Columbia itself. D.C.Code § 1–1001 et seq. The TPB, on the other hand, has been established to provide area wide transportation planning. The Board of Commissioners of the District of Columbia, on June 17, 1965, passed a resolution providing for the District's participation in the continuing comprehensive planning process for the national capital region, which would be carried on by the TPB. (Defendants' exhibit 12). The resolution makes specific reference to the requirement for such planning in § 134. The Court therefore concludes that the District government itself has recognized that it is the TPB, and not the NCPC, which is the planning body primarily responsible for the planning process called for in § 134.

The fact that the TPB has not yet completed a comprehensive transportation plan for the area does not mean that its planning activities cannot constitute the proper basis for the § 134 finding. The statute provides only that the project must be "based on a continuing comprehensive transportation planning *process*." The Court finds that the approval of the Three Sisters Bridge by the TPB in 1967 and the continuing review of the transportation needs of the

area constitutes such a "process," and the statute does not require that the planning process have resulted in a published comprehensive plan in order to constitute the basis for approval of a project under § 134.

23 U.S.C. § 103

The plaintiffs' claim of noncompliance with § 103 is based not on the statute itself, but on the implementing regulations. The regulations[58] provide that all proposals for revisions of the Interstate System should be made by the "State highway department." The term "State highway department" is defined by 23 U.S.C. § 101 as "that department, commission, board, or official of any State charged by its laws with the responsibility for highway construction." The request that the Three Sisters Bridge be redesignated as part of the Interstate System was made in a letter, dated August 12, 1969, from Mr. Airis, the Director of the District of Columbia Department of Highways and Traffic, to the Federal Highway Administrator, Mr. Turner. (Plaintiffs' exhibit 80). It was on the basis of this letter, that Mr. Turner proceeded on August 13, 1969, to restore the Three Sisters Bridge to the Interstate System. (Tr. 891).

The plaintiffs contend that under Title 7 of the D.C. Code it is the Mayor-Commissioner of the District of Columbia who has responsibility for highway construction. Since Mayor Washington made the request which led to deletion of the Three Sisters Bridge from the Interstate System in January, 1969, but has never made a request that it be redesignated as part of the System, the plaintiffs argue that the redesignation of the bridge to the System in August, 1969, violates the regulations implementing § 103.

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[58] 23 C.F.R., Part 1, § 1.6 (a), (b) (1970).

The uncontradicted evidence is that Mr. Airis wrote the letter of August 12, 1969, to Mr. Turner, not merely on the basis of the vote of the City Council approving the bridge project, but at the direction of the Mayor. (Tr. 1026–27, 1393). The Court concludes that Mr. Airis' action constitutes substantial compliance with the requirements of the statute and the regulations. The plaintiffs' argument is based on too technical an interpretation of the requirements of the statute. Although the Mayor may technically be the official with whom proposals for alteration of the Interstate System for the District of Columbia must originate, the Court finds it reasonable that the actual request be made by the official in the District government most directly involved in highway construction so long as he is acting at the direction of the Mayor. Therefore the Court finds that there has been no showing of noncompliance with § 103 or the implementing regulations.

23 U.S.C. § 317

This section provides in pertinent part as follows:

> (a) If the Secretary determines that any part of the lands or interest in lands owned by the United States is reasonably necessary for the right-of-way of any highway, or as a source of materials for the construction or maintenance of any such highway adjacent to such lands or interests in lands, the Secretary shall file with the Secretary of the Department supervising the administration of such lands or interests in lands a map showing the portion of such lands or interests in lands which it is desired to appropriate.
>
> (b) If within a period of four months after such filing, the Secretary of such Department shall not have certified to the Secretary that

> the proposed appropriation of such land or material is contrary to the public interest or inconsistent with the purposes for which such land or materials have been reserved, or shall have agreed to the appropriation and transfer under conditions which he deems necessary for the adequate protection and utilization of the reserve, then such land and materials may be appropriated and transferred to the State highway department, or its nominee, for such purposes and subject to the conditions so specified.

As discussed in connection with § 138, the Three Sisters Bridge project will involve the use of federal parklands on both the Virginia and the District of Columbia shores of the Potomac. This land is under the jurisdiction of the National Park Service of the Department of Interior. The defendants have admitted in their answer that the map called for by § 317 has not been filed with the Secretary of Interior.

The defendants contend that the filing of the map called for in § 317 is not an absolute prerequisite to the construction of the bridge. They argue that it would be a useless formality in this case in that the National Park Service has been advised of plans for the bridge and has approved the use of the parklands involved. The plaintiffs rely on the mandatory language of the statute that the Secretary "*shall* file" the map and argue that the filing of the map is a required condition precedent for construction of the bridge.

The National Park Service first gave its approval of the Three Sisters Bridge project in an agreement with respect to the overall freeway program in the Washington area entered into with the District of Columbia and Virginia in 1966. (Defendants' exhibit 19). In August, 1969, after the bridge had been redesignated as part of the Interstate System, the Park

Service issued permits for the use of the parkland on the District shore, (Defendants' exhibit 16) and this was supplemented on October 1, 1969, with permission for the use of the parkland on the Virginia shore. (Defendants' exhibit 18).

In view of the long planning history of this project, and the approval by the National Park Service of the use of the parklands involved, the Court finds that there has been compliance with the spirit, if not the letter, of § 317. The purpose of § 317 was outlined in United States v. 10.69 Acres of Land, Etc., 425 F.2d 317, 319 (9th Cir. 1970):

> The reason [for the map requirement of § 317] seems plain. When property sought for highway purposes is owned by third persons, no conflicting governmental use is likely to be involved. When the property is already owned by the United States, however, the possibility of a potentially conflicting governmental use is substantial. For this reason sections 107(d) and 317 require the Secretary of Transportation to give notice of the proposed appropriation for highway purposes to the Secretary of the Department having control of the land, and provide a means by which the latter may protect any governmental interest in use of the property for purposes other than highway construction.

The Court finds that the consultation between the District of Columbia and the Department of Transportation and the National Park Service fulfills the purpose of § 317, i.e., the affording of the governmental agency having jurisdiction over the land the opportunity to protect any nonhighway governmental interest in the land. Therefore the Court finds that strict compliance with the map filing requirement of § 317 is not a necessary condition precedent to construction in this case.

CONCLUSION

Having held the evidentiary hearing called for by the Court of Appeals, the Court finds that in planning and commencing construction of the Three Sisters Bridge, the defendants have not complied with 23 U.S.C. § 128 and the Department of Transportation Policy and Procedure Memorandum 20–8 promulgated pursuant thereto, and 23 U.S.C. § 109. Therefore the construction work on the project must be enjoined until there has been compliance with these sections of the statute and the Policy and Procedure Memorandum. The Court finds that there has been compliance with the other provisions of Title 23 of the United States Code which have been raised in this action.

The foregoing opinion shall constitute the findings of fact and conclusions of law. Counsel will submit an appropriate order within five days.

APPENDIX F

United States District Court for the District of Columbia

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., ET AL., PLAINTIFFS

v.

JOHN A. VOLPE, ET AL., DEFENDANTS

Civil Action No. 2821–69

FINAL JUDGMENT

The Court of Appeals for the District of Columbia Circuit having remanded this cause for trial pursuant to its opinion of April 6, 1970, and this Court having conducted a trial with respect to the defendants' compliance with the various provisions of Title 23 of the U.S. Code and implementing regulations, and the Court having fully considered the evidence, the proposed findings and the briefs submitted by the parties and having resolved the various factual and legal issues in the manner set forth in its opinion of August 3, 1970, it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. The defendants are proceeding with work on the Three Sisters Bridge project, as a part of Federal Interstate Route I–266, in violation of Title 23 of the U.S. Code in the following respects:

(a) Since the Department of Transportation has not yet made a determination that the entire bridge facility as planned is structurally feasible,

the Secretary of Transportation has not yet validly approved plans and specifications for the Bridge piers in compliance with 23 U.S.C. § 109(a);

(b) The District Government has not yet held a highway design public hearing on the Bridge project as required by Paragraph 6d(2) of Bureau of Public Roads Policy and Procedure Memorandum 20–8, 23 C.F.R. Part I, App. A (hereinafter "PPM 20–8");

(c) The District Government has not yet made a valid certification that it has held public hearings on the Bridge project, or has afforded the opportunity for such hearings, as required by 23 U.S.C. § 128(a); and

(d) The District Government has not yet made a valid certification that it has considered the economic and social effects of the location of the Bridge project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community, as required by 23 U.S.C. § 128(a).

2. The District Government and the Department of Transportation have complied with the requirements of 23 U.S.C. §§ 103, 134, and 138, of 23 C.F.R. § 1.6(a) and (b), and of PPM 20–8, Paragraphs 6a(1) and (3), and 6(d)(1), and have substantially complied with the requirements of 23 U.S.C. § 317.

3. The defendants are hereby enjoined from proceeding with construction work on any part of the Bridge project, and from permitting such work to proceed, until such time as all of the following steps have been taken:

(a) That the Department of Transportation has made a determination that then-existing plans and specifications for the entire Bridge facility

provide for a facility which will serve the transportation needs of the area in a manner conducive to safety, durability, and economy of maintenance within the meaning of 23 U.S.C. § 109(a);

(b) That the District Government has made a valid certification that it has considered the economic and social effects of the location of the bridge project, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community in accordance with 23 U.S.C. § 128(a);

(c) That the District Government has made a certification under 23 U.S.C. § 128(a) that it has held a highway design public hearing in compliance with all of the procedural steps required by PPM 20-8, including specifically the following:

(1) The preparation of information about design alternatives studied by the District Government in accordance with Paragraph 8b(3);

(2) The publication of a notice of a public hearing in accordance with Paragraph 8a;

(3) The holding of a public hearing in accordance with Paragraph 8b;

(4) The making of a verbatim written transcript, and making such transcript available, in accordance with Paragraph 8c;

(5) The consideration of social, economic and environmental effects in accordance with Paragraph 9;

(6) The preparation of a design study report in accordance with Paragraph 10b;

(7) The presentation of a request for design approval in accordance with Paragraph 10;

(8) Approval of a highway design in accordance with Paragraph 10d(2); and

(9) The publication of any action taken by the Division Engineer on any such request for design approval in accordance with Paragraph 11.

4. The contractor will be allowed to proceed with such work as is required to leave the project in a condition that will not create any safety hazards during such period as further construction is enjoined. Such additional work shall not involve any construction above the river bed.

5. The effect of this injunction shall be stayed for 20 days from the date of this judgment to enable the defendants to apply to the Court of Appeals for a stay pending a decision in this case by the Court of Appeals.

6. Plaintiffs shall recover the costs of this action.

JOHN J. SIRICA,
United States District Judge.

Dated: August 7, 1970.

APPENDIX G

United States Court of Appeals for the District of Columbia Circuit

No. 23870

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., ET AL., APPELLANTS

v.

JOHN A. VOLPE, ET AL.

Appeal from the United States District Court for the District of Columbia

Decided April 6, 1970

Before BAZELON, Chief Judge, and WRIGHT and MACKINNON, Circuit Judges

WRIGHT, *Circuit Judge:* This suit concerns the interpretation of Section 23 of the Federal-Aid Highway Act of 1968.[1] In that section Congress directed the District of Columbia government and the Secretary of Transportation to construct certain of the remaining portions of the Interstate Highway System in the District. Among the projects mentioned in the Act was the Three Sisters Bridge, a proposed span across the Potomac River upstream from Key Bridge crossing from Spout Run in Virginia to the Georgetown section of Washington.

The Act became law with the signature of the President on August 23, 1968. In September of 1969 the District let the first contracts for building the Three Sis-

[1] Pub. L. No. 90-495, 82 STAT. 827-828 (1968).

ters Bridge. Taxpayers and civic associations in the District brought this suit in October of 1969 for a declaratory judgment and for injunctive relief. Appellants alleged that the Secretary of Transportation and the District government were building the Bridge in violation of several provisions of Title 23 of the United States Code.

After an expedited hearing the District Court refused to grant the injunction and granted summary judgment for appellees. The court concluded that appellants' allegations of violations of Title 23 would not be considered because "Congress intended [by enacting Section 23] that the District of Columbia commence construction on the Bridge project as soon as possible, and that no further planning or hearing requirements of Title 23 need be complied with."[2] Because we do not find that Congress intended to deny the residents of the District of Columbia the protections accorded all United States citizens by Title 23, we reverse the decision of the District Court and remand the cause for hearings to determine whether there has been compliance with Title 23 in this case.

I

Section 23 of the Federal-Aid Highway Act of 1968 provides as follows:

> DISTRICT OF COLUMBIA
>
> Sec. 23. (a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct

[2] *D.C. Federation of Civic Associations* v. *Volpe*, Civil Action No. 2821-69, Memorandum and Order (Jan. 12, 1970).

all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:

(1) Three Sisters Bridge, I-226 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section G1 to C4), terminating at Bladensburg Road.[a]

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[a] The rest of the section read as follows:

(c) The government of the District of Columbia and the Secretary of Transportation shall study those projects on the Interstate System set forth in "The 1968 Interstate System Cost Estimate", House Document Numbered 199, Ninetieth Congress, within the District of Columbia which are not specified in subsection (b) and shall report to Congress not later than 18 months after the date of enactment of this section their recommendations with respect to such projects including any recommended alternative routes or plans, and if no such recommendations are submitted within such 18-month period then the Secretary of Trans-

Appellees argue strenuously that Section 23 was intended to eliminate the necessity for compliance with the "pre-construction" provisions of Title 23 of the United States Code in building the Three Sisters Bridge. Specifically, appellees urge that, despite the explicit statement in Section 23 that "all applicable provisions" of Title 23 are to govern the project, the following sections of Title 23, while applicable to similar projects throughout the country, are inappli-

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portation and the government of the District of Columbia shall construct such routes, as soon as possible thereafter, as required by subsection (a) of this section.

(d) For the purpose of enabling the District of Columbia to have its Federal-aid highway projects approved under section 106 or 117 of title 23, United States Code, the Commissioner of the District of Columbia may, in connection with the acquisition of real property in the District of Columbia for any Federal-aid highway project, provide the payments and services described in sections 505, 506, 507, and 508 of title 23, United States Code.

(e) The Commissioner of the District of Columbia is authorized to acquire by purchase, donation, condemnation or otherwise, real property for transfer to the Secretary of the Interior in exchange or as replacement for park, parkway, and playground lands transferred to the District of Columbia for a public purpose pursuant to section 1 of the Act of May 20, 1932 (47 Stat. 161; D.C. Code, sec. 8-115) and the Commissioner is further authorized to transfer to the United States title to property so acquired.

(f) Payments are authorized to be made by the Commissioner, and received by the Secretary of the Interior, in lieu of property transferred pursuant to subsection (e) of this section. The amount of such payment shall represent the cost to the Secretary of the Interior of acquiring real property suitable for replacement of the property so transferred as agreed upon between the Commissioner and the head of said agency and shall be available for the acquiring of the replacement property.

cable to the Three Sisters Bridge project[4]: (1) 23 U.S.C. § 128(a) (Supp. IV 1965–1968), which requires any state[5] building a federally financed road to hold public hearings as to design and location of any proposed highway or bridge, and to consider the "economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community";[6] (2) 23 U.S.C. § 134 (1964), which requires the Secretary of Transportation to withhold approval of new highway projects unless and until he has made an explicit finding that "such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section"; and (3) 23 U.S.C. § 138 (Supp. IV 1965–1968), which requires the Secretary of Transportation to withhold approval of projects involving the use of park land "unless there is no feasible and prudent alternative to the use of such land, and * * * such program includes all possible planning to minimize harm to such park * * * resulting from such use."

If we were to accept appellees' interpretation of Section 23, we would be confronted with difficulties,

[4] Appellants have also argued that other sections of Title 23, for example, § 317, also apply. In text we discuss only three sections for the sake of clarity. But our holding applies to all of Title 23.

[5] For purposes of Title 23, the District of Columbia is considered to be a "state." 23 U.S.C. § 101 (1964).

[6] The statute requires the states to hold "public hearings"; the regulations specify separate location and design hearings. 23 C.F.R. Part 1, Appendix A (1970). For a discussion of the applicability of these regulations to this project, *see* pp. 22–24 *infra*.

possibly of constitutional magnitude. The provisions listed above are the essential safeguards which Congress has established, on a nationwide basis, to ensure that massive freeway projects are not constructed unless there has been a good faith effort on the part of the state and local planners to take community needs and resources into consideration. Congress has directed the planners to design projects consistent with growth and development patterns, to refrain from any unnecessary destruction of valuable state or local park land, and, most importantly, to accord area residents a full and fair hearing. The Secretary of Transportation is charged with overseeing the planning and may not approve road projects, thus allowing them to be built with federal funds, until he finds that all these considerations have been properly taken into account.

The net effect of Section 23, construed as appellees insist it must be, is to divide citizens of the United States affected by road projects into two classes. One small group of citizens, the residents of the District of Columbia who will be affected by the Three Sisters Bridge, is deprived of these important rights to participate in planning the future of the community. The other class, consisting of all residents of the 50 states, still retains these federally guaranteed rights to influence all federally assisted road building. On its face, therefore, appellees' interpretation of Section 23 would result in discrimination between the District residents affected by the Bridge and all other residents of the United States affected by highway projects in their localities.

The finding of such a discrimination, however, must be only the starting point of our inquiry. In the constitutional sense, many discriminations are simply benign. The question remains whether this discrimina-

tion is based on an invidious classification between groups of citizens which rises to the level of a violation of the equal protection clause of the Constitution.[7] We find that appellees' interpretation of Section 23 would endanger its constitutionality. We reject that interpretation to save the statute.

We start our analysis by explicitly recognizing, as the Supreme Court has announced on many occasions, that it is not every legislative discrimination between similarly situated groups which is violative of equal protection guarantees.[8] The legislative branches of government, state and federal, must be given great freedom in choosing how to overcome a designated evil. The latitude given the legislature in enacting schemes of economic regulation has been especially broad.[9]

But while eschewing a close review of economic regulation, the Court has explicitly stated that it will apply "strict scrutiny,"[10] a much more searching standard of review, when "individual and personal"[11]

[7] *See Shapiro* v. *Thompson*, 394 U.S. 618, 641-642 (1969); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[8] *See e.g., Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955).

[9] With reference to economic legislation, the Supreme Court has said that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). In overseeing economic legislation, where the ways of reaching a particular goal for the legislature are almost countless, and where close judicial examination of the means chosen by the legislature can only result in a resurgency of the second guessing of the legislature inherent in the concept of "substantive due process," the judiciary must of necessity avoid close scrutiny of these schemes lest it become only a super-legislature. *See Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1128, 1131-1132 (1969).

[10] *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

[11] *Reynolds* v. *Sims*, 377 U.S. 533, 561 (1964).

or "fundamental" [12] rights are involved. As the Court recently explained, in economic regulation cases "the Court has merely asked whether there is any rational foundation for the discrimination, and has deferred to the wisdom of the state legislatures." [13] When fundamental and personal rights are at stake, however, the statute can only be sustained by meeting "the very heavy burden of justification." [14] In at least some of these cases the discrimination "must be shown to be *necessary* to the accomplishment of some permissible state objective" [15] (emphasis added) if the statute is to pass constitutional muster.[16] We think that the interpretation of Section 23 which appellees urge would unnecessarily deny District residents important personal rights granted by Title 23 to citizens elsewhere in the United States.

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[12] *Harper* v. *Virginia Board of Elections*, 383 U.S. 663, 667 (1966), quoting *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370 (1886).

[13] *Loving* v. *Virginia*, 388 U.S. 1, 9 (1967); *see McLaughlin* v. *Florida*, 379 U.S. 184 (1964).

[14] *Loving* v. *Virginia*, *supra* Note 13, at 9. Professor Cox has written that these modern equal protection cases "appear to rest upon two largely subjective judgments, * * * the relative invidiousness of the particular differentiation, * * * [and] the relative importance of the subject with respect to which equality is required." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 95 (1966).

[15] *Loving* v. *Virginia*, *supra* Note 13, at 11; *see Carrington* v. *Rash*, 380 U.S. 89 (1965).

[16] A commentary has summarized the recent cases as follows: "Thus, the cases indicate that when a fundamental interest is impaired or a suspect distinction drawn, the Court will demand a convincing demonstration that the classification is well tailored to achieve the statutory objective. How well tailored the classification must be remains somewhat obscure. The state must show at least that this classification is more than just one of several reasonable ways of achieving its goal." *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1122 (1969).

All provisions of Title 23 discussed above were enacted primarily for the benefit of the local residents whose homes and lives may be affected by a national highway construction project. These provisions were designed to keep federally assisted highways from encroaching on local parks, from being located except in accordance with an inter-community scheme of comprehensive planning, and to make sure that state planning officials are apprised of the nature and depth of local residents' feelings about the wisdom of a particular project. The legislative history of the hearing provision as it was originally enacted 20 years ago shows that Congress was concerned lest state and federal planners, thinking only of the needs of an efficient and fast nationwide highway network, fail to consider the specific particularized needs of the local communities affected by the projects.[17] As a result Congress required each state to hold public hearings at which the affected residents could demonstrate, in an orderly, regularized procedure, the community's particular requirements which the planners ought to take into account.

This hearing requirement applied to all federally aided highways. Just recently, as part of the Federal-Aid Highway Act of 1968, Congress again explicitly broadened the scope of the required hearing.[18] The present statute,[19] as interpreted by the Secretary's regulations,[20] now requires the states to hold both location and design hearings. Furthermore, the statute requires the states to have "considered the economic and social effects of such a location, its impact on the

[17] *See* S. Rep. No. 2044, 81st Cong., 2d Sess. 8 (1950).

[18] *See* Federal-Aid Highway Act of 1968 §24, Pub. L. No. 90-495, 82 STAT. 828 (1968).

[19] 23 U.S.C. § 128 (Supp. IV 1965-1968).

[20] 23 C.F.R. Part 1, Appendix A (1970).

environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community."[21] This history shows a long-standing and ever increasing congressional concern that highway planners be directly and publicly confronted with opposing views, to ensure that the planners take close account of the objections and desires of individual citizens affected by the proposed projects during the planning process.

Given this expression of legislative intent, we cannot say that this right of citizen participation in the highway planning process is an unimportant right, easily to be discarded. Those who are concerned with and most immediately affected by federal highway projects have been accorded an opportunity to both commend and criticize planned highway construction projects, projects which are inherently disruptive of the status quo in any community. According to appellees, however, Congress, while broadening (in the Highway Act of 1968) this federally enforced right to a hearing, has at the same time deprived one small group, the citizens of the District of Columbia, of this right to be heard.

These provisions of Title 23 are the only form of direct citizen participation in decisions about the construction of massive freeways, decisions which may well have more direct impact on the lives of residents than almost any other governmental action. Public hearings are the forum ordained by Congress in which citizens, particularly the citizens of the District of Columbia, participate in highway planning decisions. The Supreme Court has made it clear in a series of cases that the right of effective participation in the political process "is the essence of a democratic so-

[21] 23 U.S.C. § 128.

ciety, and any restrictions on that right strike at the heart of representative government." [22] These rights, according to the Court, are "individual and personal," [23] they touch a "sensitive and important area of human rights," [24] and they involve the "basic civil and political rights" [25] of citizens. Any classifications which "might invade or restrain" these "fundamental rights and liberties * * * must be closely scrutinized and carefully confined." [26]

We think these Supreme Court decisions must guide our analysis of the language of Section 23. The preservation of a democratic form of government requires all concerned to protect the right of each citizen to influence the decisions made by his government. Since this case involves the right of citizens to participate in the political process as it relates to federal highway projects, we subject this statute to the same scrutiny we would apply to any legislative effort to preclude some, but not all, citizens' participation in decision making.[27]

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[22] *Reynolds* v. *Sims*, *supra* Note 11, at 555.

[23] *Id* at 561.

[24] *Id.* at 561, quoting *Skinner* v. *Oklahoma ex rel. Williamson*, *supra* Note 10, at 536.

[25] *Reynolds* v. *Sims*, *supra* Note 11, at 562.

[26] *Harper* v. *Virginia Board of Elections*, *supra* Note 12, at 670.

[27] This close analysis is not unavailable because the rights in this case are derived only from statutes. In *Harper* v. *Virginia Board of Elections*, *supra* Note 12, the Supreme Court proceeded on the explicit assumption that the state had no constitutional duty to allow its citizens to vote, but had allowed some to vote as a matter of legislative grace. In holding such action violative of equal protection, the Court stated: "For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause * * *." 383 U.S. at 665. It is

We of course recognize that the right to participate in a highway hearing is not the exact equivalent of the right to vote on the project. However, the similarities between voting and the public hearing are strong. The purpose and the effect of a hearing may be the same as those of a vote. Both are designed to elicit the wishes of the "electorate." Furthermore, we take judicial notice of the fact that public hearings have oftentimes resulted in the abandonment or redesign of ill conceived projects.

Presumably Congress could have given citizens affected by federal highway projects the right to vote thereon.[28] Instead Congress has sought to channel the comments and criticisms of individual citizens concerning road projects into a public hearing. This formal, regularized procedure, with due notice to all concerned, subjects officials to the differing views of competing interest groups and forces them to take account of prevailing views while the project plans are

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settled law that "the state, having made [a procedural right] generally available on this issue, may not, consistent with the Equal Protection Clause of the Fourteenth Amendment, arbitrarily withhold it from some." *Baxstrom* v. *Herold*, 383 U.S. 107, 111 (1966). *See Goldberg* v. *Kelly*, —— U.S. ——, 38 U.S. L. WEEK 4223 (March 23, 1970).

[28] There is, of course, no constitutional right of citizens of the United States to vote on federally supported highway projects. Nor do District citizens have a constitutional right to vote generally. *See Gaffney* v. *Board of Commissioners of the District of Columbia*, D. D.C., 265 F.Supp. 736 (1967), *affirmed*, —— U.S.App.D.C. ——, 412 F.2d 1090 (1969). The point here is that Congress, having by statute accorded all citizens the right to participate in the determination of highway projects, may not deny District citizens alone that right without adequate justification for this discrimination. *See* Note 27, *supra*.

still being formulated.[29] Clearly Congress would not have insisted on such a procedure unless it intended to expose the road builders quite closely to the direct participation of citizens in the formulation of their decisions, in accord with the theory of our democratic process. Since these road projects may irreparably affect or destroy basic rights—for example, the basic right of a citizen to live in his home—we must carefully and meticulously scrutinize any proposal which would deny to some the federally created right to influence the course of a highway in their neighborhood to determine whether this discrimination is "necessary to the accomplishment" of the congressional objective—a federally financed interstate highway system.

Appellees argue that Congress intended by enacting Section 23 to bypass the hearing process because hearings would only expose community sentiment adverse to the construction of the Bridge, and that Congress

[29] *Compare Office of Communication of United Church of Christ* v. *F.C.C.*, 123 U.S.App.D.C. 328, 359 F.2d 994 (1966). There we allowed listeners to intervene as parties in F.C.C. hearings in order to ensure that the F.C.C. fulfilled its duty to take the public interest into account. Rights of full and active participation in the hearings were deemed essential by the court:

> "We cannot believe that the Congressional mandate of public participation which the Commission says it seeks to fulfill was meant to be limited to writing letters to the Commission, to inspection of records, to the Commission's grace in considering listener claims, or to mere non-participating appearance at hearings. We cannot fail to note that the long history of complaints against WLBT beginning in 1955 had left the Commission virtually unmoved * * *. Such beneficial contribution as these Appellants, or some of them, can make must not be left to the grace of the Commission."

123 U.S.App.D.C. at 338, 359 F.2d at 1004. (Footnotes omitted.)

intended that the Bridge be built irrespective of the wishes of the citizens of the District of Columbia. Appellees further argue that to allow a public hearing would cause the local authorities to delay the Bridge, and that Congress meant to preclude hearings for this reason as well.

Such a reading of the statute would condemn it as unconstitutional. A legislature may not constitutionally disenfranchise a group of citizens because of their expected views: "'Fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible. '[T]he exercise of rights so vital to the maintenance of democratic institutions' * * * cannot constitutionally be obliterated because of a fear of the political views of a particular group of bona fide residents." *Carrington* v. *Rash*, 380 U.S. 89, 94 (1965).

In addition to giving closer review to classifications involving individual rights, the Court has also imposed a higher burden of justification on some forms of classification which are "constitutionally suspect"[30] or "traditionally disfavored."[31] If we were to accept appellees' reading and interpretation of Section 23, Congress would have excluded from the statutory protection only one group, a totally unrepresented and voiceless minority of citizens. Any legislative classification which singles out for invidious treatment a small group of citizens totally excluded from the political process does not meet the usual deference from

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[30] *McLaughlin* v. *Florida*, *supra* Note 13, at 192, quoting *Bolling* v. *Sharpe*, *supra* Note 7, at 499. *See Thompson* v. *Shapiro*, *D. Conn.*, 279 F.Supp. 331, 337, *affirmed*, 394, U.S. 618 (1969).

[31] *Harper* v. *Virginia Board of Elections*, *supra* Note 12, at 668.

this court. The usual deference which courts accord legislative and administrative judgments stems from the confidence which courts have that these judgments are just resolutions of competing interests.[32] In the *Carolene Products* case, the Supreme Court pointedly raised the question "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[33]

Because the resulting classification would deprive only an already voiceless minority of its important personal right to contest disruptive highway projects enjoyed by citizens generally, we conclude that we would be hard pressed to find on this record reasons adequate to sustain the "heavy burden of justification" necessary to support the discrimination which would result from appellees' interpretation of Section 23. Appellees argue that "justification" in this case stems from Congress' desire to have the Bridge built as soon as practicable. However, if this were found to be the intent of Congress, we would have to consider whether a less burdensome alternative path to the same end might have been possible.[34] For example, Congress might have obtained speedy construction, and preserved the rights of citizen participation and comment, simply by requiring that all hearings and Title 23 determinations be concluded with reasonable promptness. Other possible "justifications" may be

[32] *Hobson* v. *Hansen*, D. D.C., 269 F.Supp. 401, 507 (1967), *affirmed sub nom. Smuck* v. *Hobson*, 132 U.S.App.D.C. 372, 408 F.2d 175 (1969).

[33] *Carolene Products Co.* v. *United States*, 304 U.S. 144, 153 n.4 (1938).

[34] *See Carrington* v. *Rash*, *supra* Note 15.

dredged up from the legislative history of the statute in an attempt to balance off the invidiousness of the discrimination for which appellees contend. We do not stop to search them out because we are convinced that appellees' position that Congress intended such discrimination is unsupported by the language and history of the statute.

II

Considering the statute as it was written, we do not read Section 23 as foreclosing the orderly procedures prescribed by Title 23. Appellees' primary argument to the contrary is that the statute directs "construction" of all the Interstate projects in the District. On the four projects mentioned in Section 23(b), including the Three Sisters Bridge, "work" was to commence within 30 days. Appellees attempt to draw a negative inference from Congress' assurance that "construction" was to be carried out in accordance with "all applicable provisions" of Title 23. Since, appellees argue, Congress only said that "construction" was to be in accordance with Title 23, it must have meant that all "pre-construction" provisions of Title 23 were somehow repealed as to these projects in the District of Columbia. We cannot agree. To our mind, any repeal of the provisions of Title 23 would have to be supported by more substantial evidence. Moreover, our interpretation conforms with the language of the statute read in the light of Title 23 which shows that "construction" includes planning.[35] We hold that Title

[35] Expenses of "construction" include "all expenses incidental to the construction or reconstruction of a highway, including locating, surveying and mapping * * *, [and] costs of rights of way." 23 U.S.C. § 101. Engineering costs, and the expenses of other activities, such as public hearings, which clearly take place long before what the statute defines as "actual building"

23 applies to all phases of the Three Sisters Bridge project.

The authoritative legislative history supports our interpretation.[36] The Senate and House reports do not indicate that any provisions of Title 23 are not to apply.[37] (The Conference Report contains no analysis of the bill as passed.[38]) We fully recognize that it is

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(23 U.S.C. § 101), also qualify as "construction" costs. *See* 23 U.S.C. § 121(d) (1964); 23 C.F.R. Part 1, Appendix A, § 12 (1970).

[36] We find no support in that history for appellees' argument that hearings were precluded because they would take too much time. There was some talk in Congress of the need to move ahead with the project. But it does not follow, as appellees insist it does, that a congressional concern with completing the Bridge *soon* requires that certain time-consuming procedures, such as hearings, be waived, while other equally time-consuming practices also required by Title 23, such as advertising for sealed bids, are to be followed. A statute would have to be much more specific if it is to eliminate certain, but not all, "time-consuming" procedures.

[37] *See* H.R. Rep. No. 1584, 90th Cong., 2d Sess., 17–19 (1968). The Senate Report, No. 1340, 90th Cong., 2d Sess. (1968), sheds no light on § 23 because there was no similar provision in the Senate version of the bill.

[38] H.R. Rep. No. 1799, 90th Cong., 2d Sess. (1968). The "Statement of the Managers on the Part of the House" was only appended to the Conference Report. It did not represent the will of the Senate conferees and can only be said to represent the personal opinions of those who signed it. The chairman of the Senate managers, Senator Randolph, agreed that the specifics in the House Managers' Statement were "dictum" and not the "intent of the Senate." *See* 114 Cong. Rec. (Part 18) 24035 (1968) (remarks of Senators Mansfield and Randolph). *See also id.* at 24028 (remarks of Senator Cooper): "I was amazed when I read the report of the managers to discover what they had written out in their managers' report." But even the House Managers' Statement contains no indication that any of the provisions of Title 23 were to be inapplicable.

not without risk to rely on the remarks of individual members of Congress for legislative history.[39] Nevertheless, we think it noteworthy that we have been able to find no statement during the floor debate by a proponent[40] of Section 23 indicating that any or all provisions of Title 23 were not to be applied in planning and building the Bridge. Indeed, the only discussions of the issue clearly indicate support of our interpretation from those supporting Section 23. For example, Representative Cramer, a leading proponent of Section 23, explicitly stated that the City Council could hold further hearings to determine route locations and designs, within the broad "corridors" established by Congress.[41] Senator Randolph gave his word

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[39] *United States* v. *Matthews*, —— U.S.App.D.C. ——, —— n.9, 419 F.2d 1177, 1182 n.9 (1969): "* * * [T]he isolated remark of one Congressman does not constitute any authority for the proposition that Congress as a whole intended [the particular result]."

[40] "The statements of proponents are much more likely to portray an accurate representation of Congress' intent than are the views of the opponents. "[W]e have often cautioned against the danger, when interpreting a statute, of reliance upon the views of legislative opponents. In their zeal to defeat a bill, they understandably tend to overstate its reach. * * * 'It is the sponsors that we look to when the meaning of the statutory words is in doubt.' *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394–395 * * *." *N.L.R.B.* v. *Fruit & Vegetable Packers & Warehousemen*, 377 U.S. 58, 66 (1964).

[41] *See* 114 Cong. Rec. (Part 15) 19923 (1968) (remarks of Representative Cramer):

> "There still can be changes in that route within the traffic corridor. At the same time there can be hearings. * * * [T]he language in the bill does not preclude hearings. As far as I am concerned, let the City Council hold hearings, let them decide which location within the traffic

to the Senate that Section 317 of Title 23 would be in effect for a specific project mentioned in Section 23(b) of the Act.[42] We also take note of the fact that when the bill was passed the Secretary of Transportation also interpreted Section 23 as we do today.[43] The contemporaneous construction of a statute by one charged with its enforcement is entitled to great weight from this court.[44]

Appellees have urged that it would be futile to hold hearings or to require the Secretary to make the determinations called for by the statute in light of the final-

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corridor should be finally approved pursuant to the section of the bill.

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"The term 'routes' as used in [§ 23] * * * refers to the traffic corridors * * * and is not intended to prescribe a specific location for any of the interstate highways to be constructed."

[42] *See* 114 Cong. Rec. (Part 18) 24033 (1968) (remarks of Senator Randolph).

[43] *See* Transcript of News Conference of the Secretary of Transportation, August 24, 1968. *See also* Statement of President Johnson, August 23, 1968, 114 Cong. Rec. (Part 24) 30958–30959 (1968) (Secretary of Transportation to approve projects named in § 23 only when they are "shown to be appropriate links in a comprehensive transportation plan for the District").

The incumbent Secretary has recently recommended further planning on at least one project mentioned in § 23(b). *See* Letter from Secretary of Transportation to Spiro T. Agnew and John W. McCormack, February 22, 1970, Enclosure 4.

[44] *Udall* v. *Tallman*, 380 U.S. 1, 16–18 (1965). "'Particularly is this respect due when the administrative practice at stake "involves a contemporaneous construction of a statute by the men charged with setting its machinery in motion, of making the parts work efficiently and smoothly while they are untried and new." ' *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408." *Id.* at 16.

ity of the location and design plans which Congress is said to have prescribed for the District. Congress, however, only directed construction of the routes "as set forth" in certain cost estimates. These cost estimates by their own terms did not constitute final route placements.[45] They only located a "corridor" within which roads were proposed.[46] The preface to the cost estimates document carefully explained that the routes were laid out only for the purpose of approximating costs, and that the cost figures there presented were based on the "least costly" of "several feasible alternatives which will serve the function of the designated route."[47] Therefore, we find no indication in the record before us that, as appellees contend, a public hearing or Title 23-required action by the Secretary would serve no useful purpose.

Congress has directed that a bridge be built over the Potomac following the general configurations laid out in the cost estimates. But there are still many varia-

[45] In any case we would hesitate to construe § 23 as precluding *any* further planning by local officials in view of Congress' long-standing practice not to make such precise decisions. *See* H.R. Rep. No. 1584, 90th Cong., 2d Sess. 53 (1968) (additional views): A rule of the House Committee on Public Works provides * * * it shall not be in order for any bill providing for general legislation in relation to roads to contain any provision for any specific road." *See also* S. Rep. No. 1965, 84th Cong., 2d Sess. 4 (1955) (interstate system to be locally planned; routes not to be dictated by federal government): 23 U.S.C. § 103(d)(1) (Supp. IV 1965–1968): "The routes of this System, to the greatest extent possible, shall be selected by joint action of the State highway departments of each State and the adjoining States, subject to approval by the Secretary * * *."

[46] *See* remarks of Congressman Cramer, *supra* Note 41.

[47] 1968 Estimate of the Cost of Completing the National System of Interstate and Defense Highways in the District of Columbia, Preface (1967).

tions of bridge design and location (particularly in relation to the placement of the access ramps) which could be adopted and still be consistent with the congressional mandate. Given the forum of a public hearing, citizens may well be able to offer constructive alternatives to the final proposals produced by the District officials, alternatives which more effectively minimize dislocation in the historically important Georgetown area.[48] In like manner, the Secretary, when required to make the determinations called for by Title 23, may well find that other feasible routes, or a tunnel, destroy fewer acres of valuable park land.

Appellees contend that construing the statute as we do to allow flexibility to federal and District officials in formulating the final plans does violence to the "[n]otwithstanding * * *" language of the statute. We disagree. Several years ago a suit was brought by some of the plaintiffs in this action to block construction of the Three Sisters Bridge and other highway projects because the District had not complied with District and federal highway laws governing the planning and construction of the projects. This court, in *D.C. Federation of Civic Associations* v. *Airis*,[49] held that the District could not construct any future freeways without complying with the relevant provisions of the District of Columbia Code. Our decision did not prevent the District from participating in interstate construction projects. The District government was free to build the freeways simply by holding the required hearings and complying with the other provisions of the law. However, instead of moving

[48] *Cf.* Secretary's letter, *supra* Note 43, recommending further planning and thought about a route mentioned in § 23(b) and detailed in cost estimates.

[49] 129 U.S.App.D.C. 125, 391 F.2d 478 (1968).

forward with the Three Sisters Bridge, the District government apparently decided to abandon the project altogether. The City Council took no further action in relation to the Bridge; the National Capital Planning Commission disapproved of the project; and finally the Secretary of Transportation deleted the Bridge from his comprehensive maps of the Interstate System for the District.

Congress reacted to the District government's inaction on highway construction by ordering a bridge to be built "[n]otwithstanding any other provision of law, or any court decision or administrative action to the contrary."[50] There can be little doubt that it was Congress' intent to countermand the District government's "administrative action" which had stopped further interstate construction. But nothing in the statute indicates that Congress intended the Bridge to be built contrary to its own laws. In essence, then, Section 23 amounts to a direction from Congress to the relevant District and federal officials to continue with the Bridge and highway plans they had been formulating prior to the *Airis* decision.

We hold that Section 23 requires that both the planning and the building of the Three Sisters Bridge comply with all applicable provisions of Title 23. Since the District Court ruled otherwise, we remand the case to the District Court for an expedited evidentiary-hearing to determine whether appellees have in fact complied with the provisions of Title 23.

In aid of the remand we feel it appropriate to comment on the meaning of the hearing requirement of 23 U.S.C. § 128. Of course, it will be for the District

[50] Presumably the "court decision" language refers to our decision in *Airis*, but the reference is mistaken since that decision was not "to the contrary."

Court to determine, after hearing all the evidence, whether the six-year-old hearings alluded to in the papers before us satisfy the requirements of Title 23. However, it should be made clear that the Secretary's regulations[51] implemgnting Section 128 apply to this Bridge project. The basic requirement is that both a location hearing (held "before the State highway department is committed to a specific proposal") and a design hearing (held "after the route location has been approved, but before the State highway department is committed to a specific design proposal") must be scheduled.[52] The regulations make specific provision for projects like this one on which some hearings have been held before the effective date of the regulations.[53] Since the regulations apply by their terms and since in promulgating the regulations the Secretary made reasonable provisions for those projects which had been the subject of hearings before the effective date of the regulations, we see no reason not to apply these regulations to this case.[54]

Reversed and remanded for proceedings consistent with this opinion.

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[51] 23 C.F.R. Part 1, Appendix A (1970).

[52] *Id.* at §§ 4(a), 4(b).

[53] *Id.* at § 6(d).

[54] These regulations apply to all projects which had not received both location and design approval from the Department of Transportation before the effective date of the regulations. Appellees assert that approval of the final location of the Bridge was obtained before that date. The accuracy of that assertion will be for the District Court to determine. However, appellees concede in their briefs that there has been no design hearing on the Bridge and that approval of the final design was not obtained before the regulations became effective. The regulations provide in § 6(d)(2)(b):

> If design approval is requested within 3 years after the date of the hearing, compliance with the design hear-

BAZELON, *Chief Judge*, concurring. I join in Part II of Judge Wright's opinion. I agree that the planning provisions of Title 23 apply to the Three Sisters Bridge project, and that the case must be remanded to determine whether there has been compliance. Because that conclusion is compelled in my view by an analysis of the statutory language and the legislative history, I find it unnecessary to reach the constitutional questions, and therefore I express no opinion on the matters discussed in Part I.

The legislative history of the Federal-Aid Highway Act of 1968 reveals a fundamental conflict over the procedures to be followed in commencing work on the Three Sisters Bridge Project. Undoubtedly some legislators thought that a statute ordering immediate construction of the Bridge would eliminate the neces-

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ing requirements is nevertheless required unless the division engineer finds that the hearing adequately dealt with design issues relating to major design features.

It may be that design approval was not requested before the end of the three-year period (*see* 23 C.F.R. Part 1, Appendix A, § 6(d)(2)(a)), or that, as appellees concede, the division engineer has not made the finding required by the regulation quoted above; or that even if the division engineer has made the required finding, the record will not support that finding. In any such case of non-compliance, the Bridge cannot proceed until design hearings which conform to the regulations have been held.

We have discussed the requirements of the hearing regulations with specificity because that issue has been clearly raised by the parties. We do not, however, confine the scope of the remand hearing to the question of compliance with those regulations. If the District Court finds that appellees have not complied with any provision of Title 23 (including the regulations contained in 23 C.F.R. Part 1, Appendix A), the District Court should enjoin further action on the Bridge project until appellees have complied with all such provisions.

sity for a least some preliminary procedures.[1] Others contemplated that the statute would simply reverse the District government's inaction and compel the government to recommence work on the Bridge in compliance with the procedures of Title 23.[2] This conflict produced an ambiguous statute, compelling the court to resolve the disagreement.[3]

The plain language of the statute directs the District of Columbia to construct the Bridge in accordance with all applicable provisions of Title 23, and to commence work on it within 30 days. If the legislators had reached agreement on the suspension of hearings and other planning procedures, they could have expressly suspended particular provisions of Title 23. We cannot read into the reference to "applicable" provisions of Title 23 a suspension of particular provisions as inapplicable, without explicit criteria for the distinction in the language of the statute itself. The Statement of the House Managers is of course entitled to respect in determining the legislative intent.[4] It cannot, however, supply the specificity necessary to make fine distinctions since no basis for those distinctions can be found in the language chosen by the legislative conferees.

Our construction of Section 23 of the Highway Act is the one adopted by the Secretary of Transpor-

[1] *See, e.g.*, Statement of the Managers on the Part of the House, H.R. Rep. No. 1799, 90th Cong., 2d Sess. (1968).

[2] *See, e.g.*, 114 Cong. Rec. (Part 18) 24033 (1968) (remarks of Senator Randolph).

[3] *Compare, e.g.*, Rosado v. Wyman, 38 U.S.L.W. 4266, 4270 (U.S. April 6, 1970) (Harlan, J.).

[4] It is not, however, entitled to the weight of a conference report, since it was not signed by a majority of the Senate conferees. *See* 79 Cong. Rec. 12237–39 (1935) (ruling by the Speaker of the House).

tation at the time the statute was enacted. The Secretary's interpretation may well have been based in part on the failure of Congress to distinguish between applicable and inapplicable provisions with the specificity necessary for effective administration.

Finally, our interpretation is further fortified by the fact that it avoids treating District residents less favorably than all other citizens with respect to the federal highway system. The court has no occasion to consider at this time the impact of any particular Bridge location or design on the public interest. It is precisely these issues which appellants seek to ventilate. Apart from constitutional considerations, we should not lightly presume that Congress has deprived District residents of an opportunity afforded to all other citizens, at least in the absence of the clearest legislative mandate, which is lacking here.

MacKinnon, *Circuit Judge*, dissenting: The panel opinion, with which I cannot agree, holds in effect that Congress did not intend to direct that the Three Sisters Bridge be built until there were further hearings. It arrives at this conclusion by refusing to consider some of the most reliable indicia of legislative intent and while it asserts reliance upon the "authoritative legislative history" it only does so to a limited extent. Consideration of *all* the legislative history including the most important Statement of the House Managers in my opinion indicates that Congress clearly directed that the Three Sisters Bridge be built immediately and I do not find that such direction was improper or invalid.

I

In interpreting any statute the language of the act itself is the most important element. Next come the written reports of the Committees and Conference

Managers. Here we are concerned with section 23 of the Federal Aid Highway Act of 1968, which is previously quoted in the panel opinion. This section was drafted in the congressional Conference Committee. The bill originated in the Senate but it contained no provision on highways for the District of Columbia. When the bill reached the House of Representatives it was amended to require "the construction, as soon as possible, of *all routes* in the interstate system within the District of Columbia as set forth in" the 1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia.[1] The House of Representatives was thus the moving force with respect to the District of Columbia highway program in this bill. With the bill in this posture it was referred to a Conference Committee to consider the disagreements between the two houses including the difference on the District of Columbia highway program. In Conference, the Managers for both houses agreed upon the language contained in section 23[2] which we are interpreting in this case. It reduced somewhat the projects that were directed to proceed immediately.

The panel opinion seeks some support for its construction of section 23 from the Senate debates and attempts to make a point of the fact that only the statement of the Managers on the part of the House

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[1] Congress frequently legislates in this manner by referring to official reports or documents within the cognizance of the committee or Congress.

[2] Section 23 in the final bill was altered over section 23 as originally adopted by the House of Representatives. Generally the final draft reduced the number of projects upon which immediate work was directed and provided additionally that a number of other D.C. highway projects, in varying stages of readiness, be studied and reported on within 18 months.

was appended to the Conference Report. In this way it attempts to work around the Statement of the Managers on the part of the House. It is necessary for the panel opinion to evade a confrontation with this vital document, because the decision it announces cannot be squared with the Statement of the Managers for the House where the bill originated. In thus-seeking some legislative backing for its construction of section 23, it refers to the remarks of Senator Cooper,[3] but it is significant that Senator Cooper was substantially in the minority on this matter; and on the final passage of the bill in the Senate his views were rejected by the entire Senate and the bill was passed 66 to 6. Senator Cooper was one of the six who voted against the bill. It is elementary that legislative intent is not reflected by floor speeches of Senators having that relationship to a bill and to the Senate's vote thereon. It is also obvious that in such circumstances, when one tries to work around the Statement of the Managers who drafted the section and replace their views with those of one Senator who opposed the section, voted against the bill and whose views on this and other portions of the bill were voted down 66 to 6, that you hardly come up with a reliable interpretation of the section. The views of the minority of a house do not indicate the intent of the majority and the panel opinion cannot make them do so.

The Senate rules do not provide for the Managers on the part of the Senate to file statements of their views as a part of Conference Committee Reports.

[3] Senator Cooper was a member of the Committee on Public Works, was a member of the Conference Committee, but refused to sign the Conference Report. His views are obviously not the views of the Senate Committee or the Senate, which recommended, adopted and passed the Conference Report and bill.

The House Rules do provide for their Managers filing Reports.[1] It is thus of no significance that the Senate Conferees on this highway bill did not file a statement.

In this case since section 23 of the bill largely originated in the House the Statement of the House Managers is all-important. They were the proponents of section 23 and it was agreed to along with the rest of the bill by the overwhelming majority of the Senate. At this point it is conducive to an understanding of the Senate action to refer to the significant remarks of Senator Randolph of West Virginia, the Chairman of the Senate Committee on Public Works that handled the bill. His remarks appear in the Congressional Record for July 29, 1968 at page 24030[2] as follows:

> One of the most difficult issues before the conference was that involving the District of Columbia interstate highway program. The language of the House bill required immediate construction of those highways in the District of Columbia as contained in the 1968 cost estimate. The Senate bill had no comparable language.
>
> The Senate conferees approached this matter with reluctance and reservation. We did not believe that this was a matter that should be handled in a national highway act. However, in the interest of comity and with the desire to

[1] Rules of the House of Representatives of the U.S., 90th Cong. (1967), Lewis Deschler, Parliamentarian. Rule XXVIII, Conference Reports § 911:

> 1. (c) And there shall accompany every such report a detailed statement sufficiently explicit to inform the House what effect such amendments or propositions will have upon the measures to which they relate.

[2] Subsequent references to Senate debates refer to the Congressional Record for this date. Vol. 114, Cong. Rec. Part 18, p. 24030, July 29, 1968.

bring a bill out of conference, we proposed certain changes in the House language and in the give-and-take which ensued, the language of section 23 of the conference report was developed.

Under the terms of this section, the District of Columbia government and the Secretary of Transportation are directed to proceed with four projects: The completion of the center leg to New York Avenue; the *construction* of the east leg; the Potomac River Freeway, and the Three Sisters Bridge. It is our belief that three of these four projects are relatively noncontroversial and can be accomplished with a minimum of disruption and dislocation to the citizens of the District of Columbia.

The fourth project, the Three Sisters Bridge, is a matter of controversy, but it is also vital to the development of proper access to Dulles International Airport and the question of the bridge had to be answered if the State of Virginia is to be able to proceed with its development and construction of Interstate Route 66. Those who took part in the conference agreed that the Three Sisters Bridge is to be built in such a way that it will not now or in the future result in any encroachment on Glover-Archibold Park. This is a matter on which we all agree and we insist that everything be done to protect that area of the District of Columbia from any kind of highway construction. *With this understanding a majority of the Senate conferees agreed to this part of the District of Columbia highway program.* (Emphasis added).

These remarks speak for themselves and indicate agreement with section 23. His statement that a majority of the Senate conferees have agreed to "*construction*" of the Three Sisters part of the District of Columbia highway program is most significant.

To obtain an accurate interpretation of the law as it was finally drafted it is also necessary to correct several other inaccuracies that appear in the panel opinion with respect to the Senate and House debates.

Further as to Senator Randolph, regardless as to how the panel opinion seeks to characterize the attitude of the Senate and Senator Randolph upon the statement of the House Managers on the Three Sisters Bridge, the fact is that Senator Randolph adopted the last paragraph of it (by reading it to the Senate) which refers to relinquishing the right of way through Glover Archbold Park in support of his statement that "we are not allowing it [building of a freeway through the park]." Cong. Rec. p. 24035. In so doing he also read the sentence which reads:

> "The *design of the bridge* does not require intrusion on the park * * *" (Emphasis added).

Does this sound as though the "design of the bridge" was still an open question? Obviously, it was not and Senator Randolph so recognized.

The panel opinion in footnote 38 also seeks to make some use of a comment on the Senate floor that the specifics in the statement of the House Managers were "dictum" and not "the intent of the Senate." (Cong. Rec. 24035). However these remarks (Cong. Rec. 24035) were directed at the "Notwithstanding" direction of the *bill* which was allegedly carried out by the Glover Archbold provision in the statement of the House Managers.[6] I do not read the remarks of Senator Randolph as stultifying section 23 of the bill as enacted, and obviously Senators and Representatives

[6] Appellants here are not at war with the direction in the statement of the House Managers that "no intrusion of" Glover Archbold Park take place. In fact, they insist upon it being carried out.

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by their individual remarks on the floor cannot authoritatively speak for the "intent" of either body contrary to the provisions that Congress enacts. What is important is not the intent of individual Senators, or even the intent of the House or Senate, but the intent of *Congress* as evidenced by the bill and the entire legislative history where that needs to be referred to. It is the intent of Congress that prevails. Statements of individual members of Congress cannot alter what Congress enacts.

No disclaimers by individual Senators or Representatives can effect what the two houses did collectively by adopting the bill *with* the D.C. highway provisions.

Senator Tydings also noted immediately following final approval of the bill that it requires the District Government to proceed with ". . . the *construction* of . . . the Three Sisters Bridge." (Emphasis added) (Cong. Rec. 24038).

Further, Senator Jackson stated he *understood* "the *freeway* would go under the existing C. & O. Canal." (114 Cong. Rec., Part 18, p. 24033). Such understanding is consistent with interpreting the legislation as recognizing that there was no question as to the *location* of that project. He was also assured by Senator Randolph that the bill would not take away from the Secretary of the Interior "an opportunity to go over the final design" of the *Potomac River Freeway* (which involved the freeway going under the C. & O. Canal). The panel opinion attempts to turn this to support additional design hearings and approval with respect to the *Three Sisters Bridge*, but it cannot be so twisted. The Potomac River Freeway project and the Three Sisters Bridge project are different projects and in different stages of planning. As the statement of the House Managers states with respect to

the Potomac River Freeway and to which Senator Jackson referred (Cong. Rec. 24033):

> "The District of Columbia Department of Highways shall immediately upon enactment of this legislation *proceed to design this entire facility.* . . ." (Emphasis added).

With the Potomac River Freeway Project in that stage of development it is perfectly obvious that subsequent *design* provisions of Title 23 might be applicable (according to their tenor) but that is no basis for saying that the same thing is true of the Three Sisters Bridge which had an approved design and which was considered as a separate project, not part of the Potomac River Freeway Project, and which was in a more advanced stage of planning and approvals—as the statement of the House Managers stated at page 34 of the Report. Neither Senator Jackson nor Senator Randolph in this colloquy were talking about the Three Sisters Bridge and their remarks cannot be twisted to that end. Moreover, Senator Randolph did not give his word that Title 23 "would be in effect for specific projects mentioned in Section 23(b) of the Act." See pp. 19–20 of panel opinion. His remarks were directed *solely* to Senator Jackson's inquiry as to *the Potomac River Freeway* and the power of the Secretary of Interior thereto. To the extent that the panel opinion seeks to convey the impression that Senator Randolph represented that *all* provisions of Title 23 would be applicable to *all* the projects mentioned in section 23(b), the opinion is incorrect. It also flies in to the face of the specific provision of section 23 that only the "*applicable* provisions of Title 23" would apply.

The panel opinion quotes Senator Cooper as being "amazed" at the House statement. This remark is of

no significance here. His objection was to legislating on the District of Columbia highways in a national highway act, to directing the District of Columbia and the Department of Transportation in connection with "the *construction*" of the D.C. roads, and to laying down "directions almost like a construction company, how to proceed with the construction." Cong. Rec. Vol. 114, part 18, pp. 24028, 24035. He never said or inferred that the statement of the House Managers was *incorrect* in any respect but only that it was too specific and out of place in a national highway act. His objection also went to the specific directions in the *bill* as to the D.C. highway program.[7] None of this furnishes any basis to challenge the *correctness* of the statement of the House Managers. Senator Cooper was also in some error about the entire D.C. highway project and he was corrected by Senator Randolph (Cong. Rec. 24034–24035). To summarize, Senator Cooper was opposed to the bill. He was opposed to the Senate's position on the bill. His views on the bill accordingly have no persuasive weight in interpreting the bill.

Floor remarks of Congressman Cramer are also misinterpreted by the panel opinion (Cong. Rec., Part 15, p. 19923). In the House debates on the bill, Congressman Cramer said in effect that the D.C. City Council could still hold hearings as to location within the corridors of the *interstate highways* to be constructed. His remarks were directed generally to the House bill *at that time* which directed that "all routes" of the Interstate Highway System in the District be constructed—not just the four projects now

[7] Senator Cooper also refused to sign the Conference Report as one of the Managers on the part of the Senate.

contained in section 23.[8] His remarks were directed primarily at the highways. The question he was answering was a general question on highways and not a specific question on the Three Sisters Bridge. To illustrate, he was certainly not indicating that there could be hearings on the unfinished portion of the Center Leg that is under construction. His remarks were not directed to section 23 as it passed nor to the statement of the House Managers of which he was one. Neither the statement of the House Managers nor section 23 as it presently exists had then been drafted. His remarks are thus not applicable to section 23 as it now exists, though they could be construed to have a general application to it.

But even more significant than these views of a few Senators and Congressmen is the statement of the Managers on the part of the House with respect to the Three Sisters Bridge. This is the document that the panel opinion seeks to ignore. *It never refers to its provisions.* True legislative intent cannot be determined by consideration of only a part of the legislative history any more than it could by considering only a part of the bill. The statement of the House Managers (hereafter the statement) is contained in the Conference Report to accompany S. 3418, House of Representatives, 90th Cong., 2d Sess., Report No. 1799, p. 34. The portion thereof dealing first with the Three Sisters Bridge reads as follows:

> The House amendment contained a provision requiring that all routes on the Interstate System in the District of Columbia set forth in "The 1968 Interstate System Cost Estimate,"

[8] It also directed immediate construction of all the highway projects now placed by section 23 in the 18-month study and report.

House Document 199, 90th Congress, be constructed as soon as possible.

The Senate bill contained no comparable provision.

The proposed conference substitute requires that, notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, not later than 30 days after enactment, commence work on the following projects:

1. *Three Sisters Bridge, I–266*

In early 1966 an agreement was reached among all affected parties as to the location of the Three Sisters Bridge. Consultant engineers have completed a type-size-and-location report on the bridge.

The specific design for the bridge was approved by the Fine Arts Commission on September 20, 1967. In writing to the Department of Highways and Traffic granting its approval, Mr. William Walton, Chairman of the Fine Arts Commission, stated in part: "We felt you designer had performed brilliantly in creating a design for one of the most important scenic sites around the Capital. Its simplicity and its daring both are very commendable characteristics."

The decision of the Fine Arts Commission in this respect safeguards the aesthetic values of concern to so many and preserves the beauty and recreational characteristics of the Potomac River. The design approved by the Fine Arts Commission shall be carried out precisely as approved with respect to materials and architecture.

The National Capital Planning Commission approved the general alinement of the bridge

on September 15, 1966, and the geometrics on May 2, 1967, subject to certain reviews by the Department of Transportation. The Department of Transportation by letter to the National Capital Planning Commission in February of 1968 returned the decision to local prerogatives. The bridge location and geometrics shall therefore proceed as presented to the National Capital Planning Commission in September of 1966 and May of 1967 with no further actions required by that or any other body.

With respect to the scheduling of construction, the Congress directs that the first substructure contracts be advertised for construction within 90 days of the enactment of this legislation.

Immediately upon completion of construction of the bridge, the District of Columbia shall relinquish to the National Park Service the right-of-way through Glover Archbold Park that it presently holds. The design of the bridge does not require intrusion on the park and the Congress directs that no intrusion of the park take place.

If the panel opinion had also considered this language they would have noted the direction that construction of the Three Sisters Bridge begin, with no further action required by the National Capital Planning Commission or any other body.

The next provision of the statement is also very significant. It states:

> "* * * the Congress directs that the first substructure contracts be advertised for construction within 90 days of the enactment of this legislation."

A mere reading of this directive makes it obvious that they were not in the same breath ordering that extensive hearings be held on location and design. Hearings

on location and design were pre-construction requirement preliminaries which had already been satisfied as the Statement observed. The statement also states that:

> In early 1966 an agreement was reached among all affected parties as to the *location* of the Three Sisters Bridge. Consultant engineers have completed a type-size-and-*location* report on the bridge. (Emphasis added).

It next states:

> The specific *design* for the bridge was approved by the Fine Arts Commission on September 20, 1967. (Emphasis added).

Does this sound as though they were directing that additional hearings be held on location and design? Obviously not. To suggest that the Conference Report in one breath directed:

> Such construction shall be undertaken as soon as possible after the date of the enactment of this Act. * * * Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:
> (1) Three Sisters Bridge, I–266 (Sections B1 to B2).
>
> * * * * * *
>
> (and from the Statement, all such shall be) * * * with no further action required by that or any other body. * * * [T]he Congress directs that the first substructure contracts be advertised *for construction* within 90 days of the enactment of this legislation. (Emphasis added).

And in the same breath directed that *new hearings* be begun on location and design, is to suggest that Congress directed an absurdity.

So it is perfectly obvious when the statement of the House Managers is read, as it must be read to truly

determine the intention of Congress, that the bill clearly directs the construction of the Three Sisters Bridge with no further action required by the National Capital Planning Commission or any other body.

Some of the confusion in the panel opinion also results in my opinion from its inability to fathom section 23 which provides in part:

> Such construction shall be undertaken as soon as possible after the date of enactment of this act except as otherwise provided in this section and shall be carried out in accordance with all *applicable* provisions of Title 23 of the United States Code. (Emphasis added).

In trying to interpret this provision the panel opinion obtains some false comfort from the negative fact that they were unable to find any statement during the congressional floor debates indicating that any or all of the provisions of Title 23 were not to be applied in the planning and building of the bridge. The panel's difficulty in this respect stems from the fact that it attempts to give a wooden interpretation to section 23.

This results from its failure to come to grips with the statement. Had they done so they would have noted that the Congress intended the Title 23 provision of section 23 to be given a *flexible* application to the four projects (and the 18 months projects) depending upon the extent to which each of the projects had progressed when the act was passed. Having failed to consider the statement of the House Managers the panel opinion thus was apparently not aware of the full import of the Title 23 provision and how it would *necessarily* apply differently to each project.

The Title 23 provision in the law was not only applicable to the Three Sisters Bridge but it was also ap-

plicable to three other projects (and to the 18 month projects). And if the panel opinion had considered the statement with respect to all the projects it would have noted that each project was in a different stage with reference to being ready for construction and that Congress was not directing the same action with respect to each project:

1. With respect to the *Three Sisters Bridge* they were directing work within 30 days and "that the first substructure contracts be advertised for construction within 90 days of the enactment of this legislation."

2. With respect to the *Potomac River Freeway* the direction of Congress was that "The District of Columbia Department of Highways shall immediately upon enactment of this legislation *proceed to design* this entire facility by use of consultants or otherwise to begin no later than 60 days from the enactment of this legislation. Construction shall commence in a logical sequence as soon as designs have been prepared."

3. With respect to the *Center Leg of the Interloop* the direction in the Conference Report emanating from the Managers on the part of the House stated:

> The center leg is *already under construction*, in various stages. It shall be completed to New York Avenue, where it will terminate until plans are completed for its continuation and connection with other parts of the system to be approved at a later date.

4. With respect to the *East Leg of the Interloop*, the direction in the report was more varied. Following are some of the excerpts:

> Interchange C is in various stages of design and construction from Sixth Street SE., to and including Barney Circle. It is the essential con-

necting link to the east leg of the inner loop, and its construction shall proceed under the current schedule until completion.

The east leg of the inner loop, extending from Barney Circle to Bladensburg Road as a part of Interstate Route I–295, shall proceed immediately as described herein.

* * * * * *

The design of the terminus at Bladensburg Road will take into account the possibility of extension of this project as a tunnel under Mount Olivet Road.

A design consultant has already proceeded with much of the design between Barney Circle and Benning Road. The District shall direct him to resume work, with the first construction contract to be advertised within 90 days of enactment of this legislation.

With respect to the portion from Benning Road to Bladensburg Road, the District of Columbia shall immediately upon enactment of this legislation commence negotiations for a design contract, said contract to start within 60 days of enactment of this legislation. Construction on this part of the project shall commence as soon as plans have been prepared. The alinement for this portion of the route shall be as presented at a public hearing in January of 1967 and subsequently approved by the National Capital Planning Commission on February 9, 1967, and the District of Columbia Board of Commissioners on March 9, 1967.

The plan here described already has the approval of all the agencies concerned, including the Park Service, the National Capital Planning Commission, and to the extent required, the Fine Arts Commission. * * *

* * * * * *

With respect to those parts of the Interstate System included in the 1968 cost estimate and not specifically dealt with above, the govern-

> ment of the District of Columbia and the Secretary of Transportation are directed to study those projects and report to the Congress within 18 months from the date of enactment their recommendations with respect to such projects, including any recommended alternative routes or plans, so that the remainder of the Interstate System within the District of Columbia may be appropriately authorized.

From the foregoing it is apparent that each of these four projects were in different stages:

> The Three Sisters Bridge had already been approved as to location and design.
>
> The Potomac River Freeway had to proceed into the final design stage and to the right of way acquisition. The direction was to proceed to design this entire facility with construction to commence in a logical sequence as soon as designs have been prepared.
>
> The Center Leg is already "under construction."
>
> The East Leg still had some design problems. And the 18 months projects were an entirely different matter.

Now it is perfectly obvious from this factual situation that nobody in Congress was going to designate what provision of Title 23 did not apply to any particular project because *all provisions applied to some of the projects.*

So Congress met the problem by stating in the Title 23 section that only the "applicable provisions of title 23" would apply.[*] If Congress had intended all provisions to Title 23 to apply they would have said the projects were to "be carried out in accordance with * * * title 23" and thus have deleted "*all appli-*

[*] Legislative bodies frequently provide that a statute designed for one purpose apply *mutatis mutandis* to another purpose.

cable provisions of." But by including the "all applicable provisions" phrase they have indicated that some provisions are *not* to be "applicable." [10] This is a perfectly reasonable standard and the provisions that are not to be applicable are the provisions of Title 23 that do not apply in "logical sequence" to the individual projects because of the progress such projects had already made in planning, designing, approving, locating and contracting (constructing). In other words, I would not interpret Congress' action as directing that the project be backed up and that steps be taken that had already been satisfied and which the Statement found had already been taken.[11] If such a flexible interpretation of the Title 23 provision is to be supplanted by a rigid interpretation that applies *all* the provisions of Title 23 to *all* the D.C. projects (as the panel opinion seeks), additional hearings *could* also be required on the *unfinished portions* of the Center Leg. This is one of the four projects referred to in section 23 and it is "under construction." Such would be an absurdity and hence the rigid application of *all* Title 23 provisions to *all* the projects must be rejected as unreasonable and obviously not intended.

[10] This is the provision the panel opinion says does not exist.

[11] The concurring opinion, by conclusory statements unsupported by factual analysis, fails to find in the statement of the House Managers the "specificity" it considered necessary to establish the standard to be applied in determining which provisions of title 23 Congress intended to be not "applicable." However, the provision of the *law* directing "work" to begin within 30 days furnishes all the "specificity" any person needs to see that Congress clearly did not intend *all* the provisions of section 23 to be applied *ex post facto*. The 30-day provision also is sufficient indication of a congressional intent that regulations promulgated *five months after* passage of the law were *not* to be considered as being within the "applicable" provisions of title 23.

It is likewise absurd to construe the Title 23 provision as indicating that Congress was directing location and design hearings on the Three Sisters Bridge since the "location" had been agreed to and the design had been approved. The panel opinion disregards the rule of reason in this legislation and overlooks the use of the word "applicable" in the congressional direction contain [sic] in the Title 23 provision.

The fact, that Congress indicated that construction should comply with the *applicable* provisions indicated that there might be some provisions that were not applicable and I submit that the obvious conclusion from all the facts; the legislative history and the background, is that the direction to construct the Three Sisters Bridge "with no further action required by that or any other body" and the direction that the first substructure contracts be advertised for construction within 90 days of the enactment of the legislation is a clear indication that Congress was not directing that hearings be held on location and design of the Three Sisters Bridge.

The location and design provisions of Title 23 could well have some application to some of the other projects but they obviously were not intended to have any effect on the project that is already under construction (that is the Center Leg of the Interloop). And once it is recognized that the section 23 has to yield to such an interpretation with respect to the project that is "under construction" because only "applicable" provisions can apply and that it would not be a reasonable construction to require *duplication* of work, then *a fortiori*, the location and design provisions of Title 23 would not be applicable to the Three Sisters Bridge because its *location* and *design* had already been approved under procedures in effect at the time these features came up in logical sequence.

So it must be concluded, that the statement of the House Managers does not conflict with any provision of section 23, and in fact fills in the blanks of misunderstanding and misinterpretation that exist in the panel opinion. This is the usual function of such a statement which is one of the most reliable indices to legislative intent that exists in our national Congress. The House statement here is particularly important because section 23 originated in the House and it was the House Conferees that were pressing it. A person who drafts a particular provision is usually a reliable source as to what was intended by the language used.

II

The action directed by section 23 is well within the powers of Congress in dealing with the District of Columbia. *District of Columbia* v. *Thompson Co.*, 346 U.S. 100, 108 (1953):

> The power of Congress over the District of Columbia relates not only to "national power" but to "all the powers of legislation which may be exercised by a state in dealing with its affairs."

To the same effect is *Atlantic Cleaners & Dyers* v. *United States*, 286 U.S. 427, 434 (1932). Congress actually has power to legislate with respect to the District of Columbia in practically the same manner that a city council legislates with respect to the streets and alleys of a city. And it frequently does so. For example, see Chapter 502, Act of August 9, 1935, relating to the Union Railroad Station in the District of Columbia. 49 STAT. 568. *See also* Chapter 354, Act of May 29, 1930 (46 STAT. 482) for the acquisition, establishment and development of the George Washington Memorial Parkway along the Potomac from

Mt. Vernon and Fort Washington to the Great Falls for an example of congressional legislation dealing with local public highways.

III

For the time being I pass over any questions under those sections of Title 23 that were in effect when the *Airis* action was brought in 1966. Only one action existed at that time for alleged failure to comply with applicable statutes. Each separate statute does not create a separate cause of action. Plaintiffs here, who must be considered the same as in *Airis*, cannot split their cause of action and now bring a second action on grounds they failed to include in *Airis*. *Bienville Water Supply Co.* v. *Mobile*, 186 U.S. 212, 216 (1902); *U.S.* v. *California and Ore. Land Co.*, 192 U.S. 355, 358 (1904); *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 319–320 (1927); *Hatchitt* v. *United States*, 158 F.2d 754, 756 (9th Cir. 1946). The bar is not absolute, but a strong public policy exists against vexatious and multiple actions and the court would do well to ignore plaintiff's alleged grounds for relief to the extent that they existed in November 1966 when *Airis* was filed.

There are strong reasons here to invoke this rule because the panel opinion in its decision, for the second time, is frustrating a congressional directive. Following this court's first decision in *Airis*, Congress enacted section 23 to supply the congressional directive to the projects that the court had found to be absent in the first case. So to permit the same plaintiffs, with the court's concurrence, to obstruct the second congressional directive on grounds they failed to allege in their first action, and to do so under the guise of carrying out the intent of Congress,[12] is not

[12] Arrived at by refusing to consider a substantial part of the legislative record.

a result that commends itself to sound judicial administration.

This however brings us to § 128 which was amended in 1968 so as to provide that

> Any State highway department which submits plans for a Federal-aid highway project . . . shall certify to the Secretary [of Transportation] that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic *and social* effects ~~of such~~ a location, *its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community.* . . . Pub. L. 90–495, § 24, August 23, 1968, 82 STAT. 828. (Matter in italics was added by 1968 amendment.)

With respect to compliance with section 128 the Deputy Director of Public Records, Federal Highway Administration, Department of Transportation, Edgar H. Swick, by affidavit of October 16, 1969 which is substantially uncontroverted swears:

> Title 23, U.S.C. § 128 was complied with, public hearings held on the subject project on November 22, 1961 and November 24, 1964 and the District of Columbia requested approval of the project on September 21, 1966, within three years of the hearings.

The affidavit also states that prior submissions to the Federal Highway Administration by the District of Columbia government and the Metropolitan Washington Council of Governments had certified and demonstrated that "the social, economic and environmental effects of the bridge project and its consistency with goals and objectives of urban planning promulgated by the community were fully *considered*." This indicates that section 128 as it presently exists has been

substantially complied with. Obviously it does not mean that *new* hearings have been held. A mere reading indicates that *new hearings are not required by the amended section.* The amendments of 1968 only required certification that certain local and environmental factors had been "considered." So no question exists as to proper compliance with section 128. It is also significant that appellants' affidavit on the hearing question does not deny that on November 24, 1964 certain hearings were held by the Commissioners of the District of Columbia with respect to the Three Sisters Bridge project.[13] In *D.C. Federation of Civic Associations, Inc.* v. *Airis*, 129 U.S.App.D.C. 125, 127, 391 F.2d 478, 480 (1968), at note 8, the court also indicates that a hearing in which specific evidence was introduced was also conducted by the Department of Highways and Traffic of the District of Columbia, citing a story in the Washington STAR appearing on February 4, 1965, section A, page 1. With the record in this state there is no basis for sending the case back for section 128 compliance hearings. Full compliance shows from the record.

IV.

Provisions dealing with the preservation of parklands were added to Title 23 (Highways) by congressional amendments in 1966 and 1968. These provided that after the effective date of the Federal-Aid Highway Act of 1968, the Secretary of Transportation shall not approve any program or project which requires the use of certain publicly owned lands, such as park land, historic sites, etc., except after compliance with certain prescribed standards. With re-

[13] Affidavit of Robert M. Kennan, Jr. of October 17, 1969.

spect to these provisions of section 138 the Swick affidavit indicates compliance with the statute by the Secretary of Transportation when he approved the Three Sisters Bridge project on August 12, 1969[1] and determined at that time that there was no prudent or feasible alternative to the use of park land, recreation areas and historic areas and that all possible planning was performed to minimize harm to these areas. In doing so the prescribed standards were complied with and the memorandum of the Secretary of Transportation recites the facts with respect thereto. This disposes of this portion of appellants' complaint.

V

The Swick affidavit thus indicates that sections 128 and 138 have been complied with. If we were to consider the other principal claims of appellants which are rejected as barred because they could have been alleged in 1966, they are also answered by the Swick affidavit as follows:

> Title 23 U.S.C. § 103 was complied with (for the second time after prior approval had been rescinded) when the District of Columbia City Council voted on August 9, 1969 to comply with section 23. Appellants in an affidavit admit this but seek to lessen the effect of this action. However, the Council action does put the project in compliance with section 103.
>
> Under Title 23 U.S.C. § 134 it was determined that the Three Sisters Bridge project was based on a continuous comprehensive transportation planning process carried on cooperatively by

[1] Swick affidavit of October 16, 1969. *And see* Memorandum of October 15, 1969 of the Secretary of Transportation reciting basis of August 12, 1969 approval, Exhibit F to Swick affidavit.

the District of Columbia, Virginia, Maryland and the various local communities with the objective of developing long range highway plans and coordinated programs for improvement in other forms of transportation. The Metropolitan Washington Council of Governments approved the project by letter dated December 29, 1967.

Under Title 23 U.S.C. § 317, the Department of the Interior was fully informed of the use of park land for the bridge project and concurred in its use in the District of Columbia. The land on the Virginia side on August 25, 1969 was subject to a final agreement on certain matters.

In all three of these sections of Title 23 present compliance occurred subsequent to November 1966, though the City Council had previously approved and then rescinded.

VI

What then of the location and design hearings that the panel opinion directs? The decision in this respect flies into the face of the act which directs the government of the District of Columbia to commence *work* on the Three Sisters Bridge "not later than 30 days after the date of enactment of" section 23 and the direction in the statement that "the Congress directs that the first substructure contracts [for the Three Sisters Bridge] be advertised *for construction* within 90 days of the enactment of" section 23.

The holding of the panel opinion in this respect directs hearings on *location* and *design* under a Policy and Procedure Memorandum that was not even promulgated until January 17, 1969 (34 F.R. 727 *et seq.*) some *five months after* Congress passed the law directing that work *begin* on the Three Sisters Bridge within 30 days and that within 90 days "substructure

contracts be advertised for construction."[15] How could construction bids for a bridge be advertised if the preliminary requirements of location and design had not been determined? Is it not plain that Congress would not direct public hearings to be held that could change the location and design of a construction project they were directing be advertised for building bids?

It is true that the regulation does make provision for situations "with respect to a project on which a hearing was held * * * before the effective date of this PPM" but a reading of the PPM[16] indicates that it only relates to situations where a *hearing* was held prior to the effective date of the PPM and *no approval* of location or design was received thereafter. It does not apply to projects upon which a hearing was held[17] and approvals received in accord-

[15] From the statement of the House Managers.

[16] d. With respect to a project on which a hearing was held, or an opportunity for a hearing afforded, before the effective date of this PPM, the following requirements apply:

(1) With respect to projects which have not received location approval:

* * * * *

(2) With respect to those projects which have not received design approval:

* * * * *

Policy and Procedure Memorandum, Bureau of Public Roads, Department of Transportation, 34 F.R. No. 12, p. 729, January 17, 1969.

[17] The hearing requirement could not be construed as referring to prior separate hearings on design, because they were not required, but only to such hearings as were provided for. In these, design might be one matter discussed in a general hearing. But the PPM provision on requests for design approval within three years, quoted in the panel opinion in footnote 54, has no application because by the forepart of the regulation it

ance with prior practices before the effective date of the PPM which was January 17, 1969. The PPM by its terms thus does not apply to the situation involving the approvals of location and design for the Three Sisters Bridge and the case should not be remanded for any hearing thereon.

To the extent that the panel opinion directs such hearings it creates a monstrous result and completely frustrates the expressed will of Congress. It arrives at that result by an incomplete consideration of the legislative history and an incorrect interpretation of floor statements. The net result is completely without any basis in the record and unjustified.

VII

What then is the meaning with respect to the Three Sisters Bridge of that provision in section 23 that directs

> Such *construction* shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of Title 23 of the United States Code.
>
> (b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:
>
> (1) Three Sisters Bridge, I–266 (Section B1 to B2).
>
> * * * * *

---

only relates to "those projects which have *not* received design approval." The Three Sisters Bridge is not in this category because its design had been approved by the Fine Arts Commission on September 20, 1967 (Swick affidavit) and there is no indication in the PPM that prior approvals are to be reconsidered or reheard.

When everything is considered it seems clear that Congress was directing compliance with those provisions of title 23 "applicable" to the "construction" [18] of the Three Sisters Bridge. This would bring into play those provisions of title 23 relating to apportionment of appropriations (section 104), letting of contracts (section 112), prevailing wages (section 113), supervision of construction (section 114), availability of apportioned sums (section 116), federal share payable (section 120), payments to states for construction (section 121), relocation of utilities (section 123), advances to states (section 124), railway-highway crossings (section 130), equal employment opportunity (section 140), small business participation (section 304), etc.

Such interpretation of the sentence would be reasonable and would not attribute to Congress an intention to require duplication of prior planning that had already been completed with respect to the Three Sisters Bridge when Congress enacted section 23. With respect to projects which were not as far advanced as the Three Sisters Bridge, they would have to comply with requirements they had not fulfilled before the amended requirement became effective. I would thus attribute to Congress the reasonable intention of not requiring duplication of work already completed according to then existing standards. This is the real intention that Congress meant to convey when it used the words "applicable provisions of Title 23" other than directing full "compliance with Title 23."

[18] The statutory definition of "construction" in title 23 is not strictly applicable because section 23 is not a part of Title 23.

VIII

As for the claim that plaintiffs are a "voiceless minority" in the District of Columbia who are being made the subject of invidious discrimination, it should be recognized that plaintiffs here and their lawyers are actually some of the most articulate and politically powerful individuals in America. Their success in obstructing this project now for onto four years is mute testimony that they are not "voiceless." Actually, it is commonly recognized that their close proximity to the seat of Government, the influence of a favorable local press that articulates their position and the frequency with which members of Congress, long resident in the District and its environs, tend to acquire similar local interests to those of local residents, on many issues, gives them more actual influence in Congress than citizens of states.

And, most importantly, despite incorrect statements in the panel opinion, there is no showing that they have been discriminated against here. Each interstate D.C. highway project as it progressed from planning to construction was subjected to the same procedures under Title 23 as interstate state highway projects. The same law applied to all such projects, that being the law that existed at the time the D.C. or state project passed through each successive stage. There is no showing that amendments to the Federal highway laws were made to apply *ex post facto* to highway projects that had previously passed through particular stages *before* new provisions were added. The reason for this is that legislation generally is given a prospective application.

In passing it should be noted that the numerous Fourteenth Amendment cases on equal protection are well recognized as not applying to the situation here.

Also, that "unjustifiable discrimination" under those rare Fifth Amendment cases does not exist here because (a) there has not been any refusal to accord D.C. residents any right afforded state residents at the same time, and (b) even if there had been it is not the grievous loss that is "so unjustifiable as to be violative of due process." *Schneider* v. *Rusk*, 377 U.S. 163, 168 (1964); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954); *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring); *and see Shapiro* v. *Thompson*, 394 U.S. 618, 641–642 (1969). *Goldberg* v. *Kelly*, —— U.S. —— (March 23, 1970) applied a similar standard to rights claimed under the Fourteenth Amendment. (See slip op. 8)

I would accordingly not require location or design hearings now on the unfinished portions of the Center Leg that is under construction, nor to the Three Sisters Bridge where location and design had previously been approved. It seems that the Potomac River Freeway and the East Leg have some design problems. Where they stand on location has not been presented or studied in this case. It appears that the 18 months projects are similarly in different categories as to title 23 requirements. Each project should be considered separately, but I do not consider that the 1968 amendments to title 23 or the 1969 PPM require any project to be backed up for different consideration of planning or construction phases that it had previously passed through. I would affirm.

Appendix H

23 U.S.C. 109(a) provides:

> The Secretary shall not approve plans and specifications for proposed projects on any Federal-aid system if they fail to provide for a facility (1) that will adequately meet the existing and probable future traffic needs and conditions in a manner conducive to safety, durability, and economy of maintenance; (2) that will be designed and constructed in accordance with standards best suited to accomplish the the foregoing objectives and to conform to the particular needs of each locality.

23 U.S.C. 128(a) provides:

> Any State highway department which submits plans for a Federal-aid highway project involving the by passing of, or going through, any city, town, or village, either incorporated or unincorporated, shall certify to the Secretary that it has had public hearings, or has afforded the opportunity for such hearings, and has considered the economic and social effects of such a location, its impact on the environment, and its consistency with the goals and objectives of such urban planning as has been promulgated by the community. Any State highway department which submits plans for an Interstate System project shall certify to the Secretary that it has had public hearings at a convenient location, or has afforded the opportunity for such hearings, for the purpose of enabling persons in rural areas through or contiguous to whose property the highway will pass to express any objections they may have to the proposed locations of such highway.

Such certification shall be accompanied by a report which indicates the consideration given to the economic, social, environmental, and other effects of the plan or highway location or design and various alternatives which were raised during the hearing or which were otherwise considered.

23 U.S.C. 134(a) provides:

It is declared to be in the national interest to encourage and promote the development of transportation systems, embracing various modes of transport in a manner that will serve the States and local communities efficiently and effectively. To accomplish this objective the Secretary shall cooperate with the States, as authorized in this title, in the development of long-range highway plans and programs which are properly coordinated with plans for improvements in other affected forms of transportation and which are formulated with due consideration to their probable effect on the future development of urban areas of more than fifty thousand population. After July 1, 1965, the Secretary shall not approve under section 105 of this title any program for projects in any urban area of more than fifty thousand population unless he finds that such projects are based on a continuing comprehensive transportation planning process carried on cooperatively by States and local communities in conformance with the objectives stated in this section. No highway project may be constructed in any urban area of fifty thousand population or more unless the responsible public officials of such urban area in which the project is located have been consulted and their views considered with respect to the corridor, the location and design of the project.

23 U.S.C. 138 provides:

It is hereby declared to be the national policy that special effort should be made to preserve

the natural beauty of the countryside and public park and recreation lands, wildlife and waterfowl refuges, and historic sites. The Secretary of Transportation shall cooperate and consult with the Secretaries of the Interior, Housing and Urban Development, and Agriculture, and with the States in developing transportation plans and programs that include measures to maintain or enhance the natural beauty of the lands traversed. After the effective date of the Federal-Aid Highway Act of 1968, the Secretary shall not approve any program or project which requires the use of any publicly owned land from a public park, recreation area, or wildlife and waterfowl refuge of national, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof, or any land from an historic site of national, State, or local significance as so determined by such officials unless (1) there is no feasible and prudent alternative to the use of such land, and (2) such program includes all possible planning to minimize harm to such park, recreational area, wildlife and waterfowl refuge, or historic site resulting from such use.

Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827, provides:

(a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of

Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

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OCTOBER TERM, 1971

No. 71-931

JOHN A. VOLPE, *et al.*,
Petitioners,

v.,

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-931

JOHN A. VOLPE, *et al.*,

Petitioners,

V.

D.C. FEDERATION OF CIVIC ASSOCIATIONS, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATUTES AND REGULATIONS INVOLVED

Since the portions of Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827, set forth in Appendix H to the petition, omit certain material provisions, the relevant parts of Section 23 are fully set forth in Appendix A, *infra*, Q.A. 1a-2a.[1] In addition to the statutes cited in the petition (Pet. 2), the case also involves

[1] The appendix to the petition is referred to herein as "P.A." The appendix to this brief in opposition is referred to as "Q.A." The petition is referred to as "Pet."

a regulation promulgated by the Department of Transportation to implement 23 U.S.C. § 128, entitled Policy and Procedure Memorandum 20-8 ("PPM 20-8"), 23 C.F.R., pt. 1, App. A (1971), which is reproduced in relevant part in Appendix A, *infra*, O.A. 2a-3a.

QUESTIONS PRESENTED

1. Where Federal highway officials are under admitted political pressure to commence immediate construction of a controversial highway bridge as to which plans have never been prepared or hearings held, and where they then depart from all standard procedures and commence construction of a set of bridge "piers" without knowing (a) whether a bridge structure can safely be built upon the piers, (b) how the bridge is to be connected to other traffic systems, (c) how the project will affect park lands, historic sites and the environment, or (d) how the entire project will relate to transportation planning in the area, was it reversible error for the courts below to conclude factually, in such unique circumstances, that the administrative decision to commence immediate construction was "premature" in relation to the planning, design and public hearing requirements of the Federal highway laws?

2. Where an act of Congress applicable only in the District of Columbia provides that the District of Columbia Government should proceed with a local highway project "in accordance with all applicable provisions" of the Federal-aid highway laws, was it reversible error for the United States Court of Appeals for the District of Columbia Circuit to interpret this purely local statute as requiring this particular local project to be planned, designed and constructed in accordance with the legal requirements which are applicable generally to all projects constructed under the Federal-aid highway laws?

COUNTERSTATEMENT

The instant petition seeks to involve this Court in a local transportation controversy, aptly termed a "long and sometimes acrimonious imbroglio," involving the proposed "Three Sisters Bridge" across the Potomac River (P.A. 2a). In view of the complexity and uniqueness of the project's history, it is clear that the official conduct involved in this case is without precedent and will almost certainly never be repeated, either in the District of Columbia or anywhere else in the country.

The events surrounding the filing of the instant petition are also extraordinary. As is commonly known, and as is amply explained in the findings of fact below (P.A. 24a-25a, 76a-88a), the Federal Government and the District of Columbia Government for many years have been attempting to obtain Congressional appropriations for the construction of a rapid transit subway system in the Washington Metropolitan area, and Representative William Natcher of Kentucky has been using his unique Congressional position (as Chairman of the District of Columbia Subcommittee of the House Committee on Appropriations) to block the appropriation of the subway funds until acutal commencement of construction of the Three Sisters Bridge—a project which the District of Columbia's planners consider unnecessary and undesirable (P.A. 12a, 145a).

On October 12, 1971, the court of appeals below held that the construction of the bridge could not lawfully go forward until certain planning steps had been taken as required by Title 23 of the U.S. Code (the Federal-aid highway laws) (P.A. 5a-23a). The immediate result was a continued freeze of the subway funds, threatening financial starvation for the entire subway system. In this crisis the President of the United States publicly announced on November 18, 1971 (immediately after Mr. Natcher's committee had voted to withhold the subway funds[2]) that one

[2] *Wash. Evening Star*, Nov. 19, 1971; *Wash. Post*, Nov. 19, 1971.

of the things that "has to happen" in order to "save" the subway system was to have the Attorney General of the United States seek reversal of the court of appeals' decision; accordingly, the President "ordered" the Attorney General "to file a petition for certiorari with the Supreme Court."[3] While the President's order had the desired effect of placating Mr. Natcher and obtaining release of the subway funds,[4] it also serves to distinguish the instant petition, *prima facie*, from normal Government certiorari petitions which are filed by the Solicitor General on his own initiative.

The contents of the petition are also unusual in several respects. First, faced with the task of finding in this case some issue worthy of this Court's consideration, the authors of the petition have articulated a series of issues which were neither raised by the evidence nor decided below. The petition states that the court of appeals enunciated certain novel and general "holdings" which will be applicable to Federal-aid highway projects generally and which will have such an "important" impact upon the administration of "the Federal highway program" that review by this Court is appropriate (Pet. 6), but, as further discussed below, none of the asserted "holdings" was actually made in the opinion below. Secondly, although in terms of subject matter the petition is directed to the planning and design of Federal-aid highway projects, the petition's "Statement" of the case says almost nothing about the unique record facts as to the actual planning and design events which occurred in this case. In view of the petition's silence on this score, and since the extraordinary facts of the case control the nature of the issues which may or

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[3] 7 Weekly Compil. of Pres. Docs. 1534 (1971).

[4] Very soon after the President's announcement the subway funds were appropriated. See 117 Cong. Rec. H 11643-81 (daily ed. Dec. 2, 1971). Mr. Natcher noted his belief that the President "will carry out the commitments set forth in . . . the statement" of November 18, 1971. 117 Cong. Rec. H 12579-80 (daily ed. Dec. 15, 1971).

may not be presented for review here, the facts must be set forth at somewhat more than the usual length in this brief in opposition to certiorari.

A. THE STATUS OF PLANNING AND DESIGN WORK ON THE BRIDGE PROJECT ON AUGUST 23, 1968, WHEN CONGRESS PROVIDED THAT "WORK" SHOULD PROCEED ON THE PROJECT

On August 23, 1968, the Congress enacted Section 23 of the Federal-Aid Highway Act of 1968, 82 Stat. 827 (O.A. 1a-2a) providing that the District of Columbia Government, within 30 days thereafter, "commence work" on four local highway "projects," including the "Three Sisters Bridge" (an element of Interstate Route "I-266"), and that the projects be carried forward as Federal-aid highway projects "in accordance with all applicable provisions of title 23 of the United States Code." The type of "work" to be commenced on each project within the 30-day period was not specified, but the term clearly was not intended to require actual construction.[5] In fact the record discloses that as of August 23, 1968, much planning and designing work remained to be done before any actual construction work could possibly commence on the bridge. Specifically:

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[5]The petition inaccurately characterizes the statute as requiring that actual construction commence within 30 days (Pet. 2, 3, 6). That this interpretation is incorrect is readily demonstrable:

(1) The principal proponents of the statute in the House of Representatives said in their statement (upon which petitioners heavily rely) that they wanted "the first substructure contracts [to] be *advertised* for construction within *90 days* of the enactment of this legislation" (Pet. 18, quoting H. Rep. No. 1799, 90th Cong., 2d Sess. 34-35 (1968) (emphasis added)).

(2) The term "construction" as used in § 23(a) of the Act was clearly intended to include pre-construction study and analysis as well as actual building activity, as is indicated by the fact that the term includes the 18-month study which was to be undertaken with respect to projects covered in § 23(c) (O.A. 1a-2a).

(1) As of August 1968 the only bridge design or plan which the District Government had in hand was an artist's rendering or sketch depicting a daring single-span bridge reaching almost from shore to shore without any piers or supports in the main body of a river (PX 57).[6] The sketch showed a bridge only; it did not indicate the type, size or location of the ramsp, interchanges, and approach roads which would be necessary to connect the bridge to other, existing or new facilities.

(2) The Federal Department of Transportation ("DOT"), acting through its Bureau of Public Roads ("BPR"), had refused to approve the sketch involved because it appeared to call for "the longest pre-stressed concrete bridge of its type in the world" (P.A. 139a), and BPR did not know whether it would be possible to engineer and build such a structure with safety. (PX 69; *see* P.A. 139a n. 56). BPR itself characterized the project as "extremely hazardous and fraught with danger" (P.A. 140a) and less than a month after August 23, 1968, stated that it would be necessary to make a "comprehensive feasibility study" before proceeding further (P.A. 139a n. 56).[7] BPR therefore called for the building and testing of "scale models of this bridge and adjoining structure . . . before final commitment is made for this type of structure" (*Ibid.*).

(3) Before a river bridge can be constructed it is necessary (a) to determine (by test borings, etc.) whether the river bed at the chosen location is adequate to support the entire bridge, and (b) to prepare engineering designs for both a horizontal superstructure and appropriate supporting piers (Pet. App. 137a-38a). In August 1968 exploratory test boring was unfinished, and the engineering design-

[6] *See also* DX X and W, attached to affidavit of Thomas F. Airis submitted in support of defendants' motion for summary judgment.

[7] BPR was also "gravely concerned over the massive appearance of the bridge which is equivalent in height to a six-story building" at its ends (P.A. 139a n.36).

ing of superstructure and piers had not even begun (PX 40, 42, 55, 57, 61, 85).

(4) It was contemplated that traffic on both sides of the Potomac River should be given access to the bridge by a series of ramps and interchanges to be built within Federal park lands and areas designated as "historic sites,"[8] but the required planning report on the Type, Size and Location of such ramps and interchanges ("TS&L Report") had not been prepared (PX 145, p. 451; Tr. 1542-45),[9] so that it was not yet known which specific lands would be affected by the ramps and interchanges.

The result was that as of August 23, 1968, when Congress provided that "work" should proceed with respect to the bridge project, all of the following steps remained to be taken before actual construction work could commence:

1. The construction of a scale model of the novel bridge structure then proposed (in order to permit engineering testing for structural safety), and consideration by BPR as to whether the proposed structure would be structurally safe within the meaning of 23 U.S.C. § 109.

2. Test boring to determine whether the river bed conditions were adequate to support the proposed bridge structure and piers.

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[8]The park lands involved are (a) the Chesapeake & Ohio Canal Reservation and (b) park lands within the George Washington Memorial Parkway. The historic sites affected by the bridge include the Chesapeake & Ohio Canal and the Historic Georgetown District (P.A. 90a), both of which are on the National Register of Historic Places. 35 Fed. Reg. 2481 (1970).

[9]A TS&L Report -- setting forth the basic plan for all aspects of a project -- is required under normal BPR procedures and must be processed through and approved by BPR before the preparation of engineering designs (Tr. 481-87).

3. The preparation of a new mandatory TS&L Report on the bridge itself, if required by the results of the model testing.[10]

4. Analysis and approval by BPR of the final TS&L Report on the bridge itself (Tr. 481-87).

5. The preparation of TS&L Reports relating to the ramps and interchanges on both sides of the river (Tr. 1542-45).

6. Analysis and approval by BPR of the TS&L Reports on the ramps and interchanges.

7. Consideration by the Secretary of Transportation as to whether there were any feasible and prudent alternatives to the use of the park lands and historic sites, and whether the project included all possible planning to minimize harm to such lands, pursuant to 23 U.S.C. § 138.

8. Consideration by DOT as to whether the entire project, including the bridge and its ramps and interchanges, could be said to be based upon comprehensive transportation planning in the area pursuant to 23 U.S.C. § 134.

9. The preparation of the engineering designs—known as "contract Plans, Specifications, and Estimates" ("contract PS&E")—for the entire structure, including both superstructure and piers.[11]

10. Preparation of contract PS&E for the ramps and interchanges.

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[10] A TS&L Report incorporating some artist's renderings of a bridge design had been prepared by a private highway consultant in 1967 (P.A. 122a-23a), but as of August 1968 BPR had declined to approve the report because of doubts about structural safety. Indeed, as of the time of trial (June 1970) BPR had not yet approved that TS&L Report (P.A. 123a).

[11] Under BPR procedures, "contract PS&E" can be prepared only after BPR (a) has received and approved the TS&L Report and (b) has authorized the preparation of contract PS&E (Tr. 486-87, 990, 1543-45).

11. Analysis and approval by BPR of the contract PS&E (PX 90).

12. Authorization by BPR for advertising for bids for various actual construction tasks (PX 90).

13. Advertising for and receipt and analysis of bids, and approval of awards by BPR (Tr. 1047).

B. THE "WORK" DONE ON THE BRIDGE PROJECT IN THE PERIOD AUGUST 1968 THROUGH JULY 1969

It is undisputed that in the 12-month period following enactment of the 1968 Highway Act the highway officials involved (both D.C. and Federal) took *none* of the steps which, as indicated above, needed to be taken in order to permit construction to proceed. The reason for this inactivity is also undisputed. Immediately after the signing of the 1968 Act, the Secretary of Transportation expressed concern as to whether the proposed bridge project would be consistent with long-range comprehensive transportation planning for the area, and as a result the National Capital Planning Commission—the central planning agency for the Federal and District Governments[12]—was directed to draw up a comprehensive transportation plan for the area in order to provide a basis for judgment as to whether the proposed bridge could be built in conformity with the comprehensive planning requirements of 23 U.S.C. § 134 (P.A. 70a, 175a & n. 43). As noted in the petition (Pet. 3), NCPC did prepare such a plan in 1968; the plan indicated that the bridge should not be built; the D.C. Council approved the plan; the Mayor thereupon requested the deletion of I-266 (including the bridge and its approaches) from the Interstate Highway System; and in January 1969 DOT deleted I-266, thus deferring the project as a Federal-aid highway project. One of the rea-

[12] 40 U.S.C. § 71a(a). NCPC was under an explicit statutory mandate to prepare a comprehensive plan for the National Capital Region including a transportation element thereof. 40 U.S.C. §§ 71c, 71e.

sons for DOT'S deletion of I-266 was its conclusion that, since the bridge project was excluded from NCPC's 1968 plan, the project could not lawfully go forward consistent with the Congressional planning requirements set forth in 23 U.S.C. § 134 (Tr. 363-65, 371-72).[13]

In the summer of 1969, however, Representative Natcher brought "strong political pressure" to bear on both the District and Federal Governments in an effort to force them to move forward with the bridge project, again threatening the withholding of the necessary subway funds if construction of the bridge project were not commenced at once (P.A. 77a). It was found as a fact by the district court below (Pet. App. 80a) that the District Government "yielded to this pressure" by requesting reinstatement of I-266 in the Interstate System[14] and that Secretary Volpe immediately reinstated the route on August 12, 1969, simultaneously expressing the "hope" that his action would result in the release of the subway funds (P.A. 81a).[15] Immediately thereafter the President of the United States also notified Mr. Natcher that he "trusted" that Mr. Volpe's action satisfied Mr. Natcher's demands and that Mr. Natcher would now release the subway funds (P.A. 82a).

[13]It has never been suggested that this decision by DOT, made on advice of its General Counsel (Tr. 386), was improperly inconsistent with § 23 of the 1968 Highway Act.

[14]The petition states that in August 1969 "the D.C. Council reversed its previous action" of December 1968 (Pet. 3). That is not the fact. In December 1968 the D.C. Council approved the NCPC plan; thus disapproving the bridge project on its merits, and the Council's approval of the plan (and disapproval of the bridge project) has never been rescinded or revoked (Def. Ans. Interrog. No. 10 (2d Set)). The district court found as a fact that in August 1969, when the D.C. Council voted to proceed with the bridge project, it did so, not because it approved the bridge project on its merits, but only because it thought that it must build the unwanted bridge in order to obtain release of the wanted subway funds (P.A. 80a).

[15]Petitioner Volpe has claimed, as further explained below (pp. 20-23 *infra*), that at the time he reinstated I-266 he also made a number of legally-required factual determinations with respect to the

C. PETITIONERS' DECISION IN AUGUST-SEPTEMBER 1969 TO COMMENCE CONSTRUCTION OF THE PIERS FOR A BRIDGE STRUCTURE

In August 1969 petitioners found themselves in a difficult dilemma. On the one hand, Mr. Natcher was pressing for immediate commencement of actual construction work on the bridge, and petitioners were anxious to begin some sort of construction activity in order to obtain immediate release of the subway funds. On the other hand, BPR's engineers were of the view that the type of bridge structure then proposed was "extremely hazardous and fraught with danger" and that construction of such a bridge could not safely be commenced until scale-model testing had been completed (P.A. 139a-41a)—a process which has since taken a full two years and which may or may not be complete, even today.[16]

In the face of these difficulties petitioners made a truly extraordinary decision. Although they did not know, in September 1969, what sort of a bridge could or would be built, they decided—in "great haste" because of the "urgent" need "to appease certain members of Congress" and obtain release of the subway funds (P.A. 88a)—to let a contract

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bridge project and that he made each such factual determination on its merits without improperly taking into consideration the irrelevant problem relating to the release of the subway funds. The latter question was considered at length by both courts below (the district court finding that in fact the problem of the subway funds "was given some consideration" by Mr. Volpe in the decision-making process (P.A. 86a)), but since petitioners have chosen not to "consider" the issue here (Pet. 5 n.3), respondents can properly follow suit.

[16] The petition asserts that the model testing which was commenced after the district court's decision below (*i.e.*, after August 1970) "has since confirmed the structural feasibility of the proposed bridge" (Pet. 4 n.2), but there is nothing in the record on that subject, and, so far as we know, no testing results have ever been officially or publicly revealed, although Mr. Natcher did report that while under construction "the model . . . broke." 117 Cong. Rec. H 3756 (daily ed. May 11, 1971).

for construction of a set of *piers* in the river, even though petitioners did not yet know what sort of piers would be most appropriate to the type of superstructure to be selected in the future.[17] In any event, contract PS&E for a set of piers—exclusive of superstructure—were hastily drawn up; bids were solicited on an extraordinarily expedited schedule; a contract was let within hours; and Mr. Natcher was immediately notified that construction work (of a sort) was about to begin—at which point he agreed to release the subway funds (P.A. 87a-88a, 137a).[18] That this procedure was highly unusual was admitted by the responsible BPR engineer (Mr. Hall), who said that on only one other occasion in his 35 years' experience had he ever authorized construction of a set of piers before the structural feasibility of the bridge superstructure had been determined (P.A. 143a). In these circumstances it seems

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[17]Both courts below recognized that the "piers" of a bridge are "integral parts" of the structure and that a rational decision as to the type, size, number and location of the piers cannot be made until after the type of superstructure has been selected. For this reason the district court, with the concurrence of the court of appeals, held in effect that petitioners could not properly proceed with construction of a set of piers until they had selected and approved the design of the superstructure (P.A. 15a, 138a-44a).

[18]The petition repeatedly and erroneously characterizes the contract of September 1969 as having been limited to "preliminary" work such as "exploratory" subsurface borings (Pet. 3, 4 n.2, 10). In fact the original contract was for complete construction of the bridge piers within one year (Tr. 1043). The first stage of work included the subsurface exploration of river bed conditions, which revealed unexpected foundation problems, which in turn required a "major" contract revision (Tr. 601-03, PX 112) and led to such delays that, when work was enjoined eleven months later by the district court, no actual construction work on the piers had been done. The steel structure which can now be seen in the river is merely part of a temporary cofferdam put in place on the last day of work for use in connection with any actual construction work that might be done in the future.

extremely unlikely that such a set of facts will ever arise again in the administration of the Federal-aid highway system.

D. PETITIONERS' ALLEGED COMPLIANCE WITH TITLE 23 OF THE U.S. CODE AND THE CHALLENGED "HOLDINGS" OF THE COURT OF APPEALS BELOW WITH RESPECT THERETO

On the basis of the extensive record developed at trial, the district court held that petitioners, in authorizing construction of the bridge project to proceed in September 1969, had committed three violations of Title 23 of the U.S. Code and implementing regulations.[19] The effect of the resulting injunction, as entered by the district court, was to require the District Government and DOT to take additional planning and design steps before allowing construction to proceed, and in these respects the district court's rulings and order were affirmed by the court of appeals. None of these conclusions, on which there was no disagreement between the courts below, is challenged by petitioners.

As to five specific additional claims advanced by respondents below under Title 23 of the U.S. Code, the two lower courts disagreed. It is significant, however, that in virtually all of these five instances the court of appeals accepted the

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[19] The petition erroneously states that the district court found only two violations: (1) a violation of 23 U.S.C. § 109 (in allowing construction of the piers to begin before the safety of the structure had been determined), and (2) a violation of the regulations promulgated by DOT under 23 U.S.C. § 128 (in proceeding without holding a "design hearing") (Pet. 4). In fact the district court also held that petitioners had violated an additional requirement of 23 U.S.C. § 128 in that the District Government had failed to make a supportable certification that it had considered the social, economic, and environmental effects of the proposed project and its consistency with urban planning goals for the area (P.A. 133a-36a). The court of appeals expressly affirmed the first and third of these rulings but found it unnecessary to review the second (P.A. 15a, 18a & n.52, 20a n.57).

district court's view of the underlying facts and found fault only with the "reasoning" by which the district court reached its ultimate conclusion (*see, e.g.*, P.A. 10a, 16a, 17a, 19a). Petitioners' suggestion that the court of appeals set aside virtually all of "the district court's carefully documented factual findings" (Pet. 6-7 &n.4) is simply not true.

The basic theme of the petition is (a) that, with respect to four specific statutory provisions (23 U.S.C. §§ 134, 109, 138, and 128), the court of appeals below announced four "holdings," as general propositions of law, to the effect that actions taken to comply with these statutes are legally insufficient if taken before the completion of "final plans" for a Federal-aid highway project, and (b) that these four holdings, being decisive in the case, require corrective action by this Court. It is the respondents' position that in fact the court of appeals did not enunciate *any one* of the four supposedly decisive "holdings" now attributed to it. The facts and the "holdings" below with respect to each of the four cited statutory provisions are as follows:

1. 23 U.S.C. § 134 (the Requirement of a Comprehensive Transportation Planning Basis)

Section 134 requires that, before DOT can approve construction of a Federal-aid highway project in an urban area, DOT must make a factual determination that the particular project is "based on a continuing comprehensive transportation planning process carried on by States and local communities . . ."

(a) *The facts*

The only relevant facts are these:

In 1967 an unofficial regional organization, the so-called Metropolitan Washington Council of Governments ("COG"), expressed the opinion that the bridge project as then conceived would be "consistent with comprehensive planning in the region" as its existed in 1967, although it is the fact

that no comprehensive transportation plan for the region had ever been adopted as of that time (P.A. 14a, 146a).[20]

In 1968 NCPC (the central planning agency for the District and Federal Governments) adopted the first and thus far the only comprehensive transportation plan ever developed for the Washington area. The 1968 NCPC plan excluded the bridge project on the ground that it was both "unnecessary and undesirable" (P.A. 12a, 145a).

At the trial the responsible DOT official, Mr. Hall, took the position that in September 1969 he made the factual determination required by § 134 and that he made it by taking "mental" note of the 1967 opinion of COG with respect to the state of transportation planning in the region *in 1967* (P.A. 13a, 145a). His alleged "mental finding" of September 1969 (of which he made no written record) was based solely on the 1967 opinion of COG and without regard to the later NCPC plan—although both Mr. Hall and the district court agreed that NCPC's plan was "relevant" to the determination to be made under § 134 (P.A. 146a-47a).[21]

(b) *The holding of the Court of Appeals*

In concluding that Mr. Hall's alleged "mental" act of September 1969 did not constitute compliance with 23 U.S.C. § 134, the court of appeals relied upon one factual

[20] COG's opinion was obtained in connection with the Demonstration Cities and Metropolitan Development Act of 1966, 42 U.S.C. § 3334 (P.A. 14a, 146a) and was not intended to provide a basis for a decision under 23 U.S.C. § 134, which DOT concedes has different requirements (Tr. 842-43).

[21] The petition asserts, erroneously and without record citation, that COG's 1967 opinion "was based on its planning process" (Pet. 9 n.7) and that COG has *approved* the bridge project "continuously since December 1967" (Pet. 3 n.1). The 1967 COG opinion was based on comprehensive planning in the region by all Washington area planning agencies, not COG's own planning process (PX 59), and there was no evidence that after 1967 COG ever reconsidered the bridge in light of NCPC's significant and admittedly relevant 1968 plan (Tr. 1110-11).

conclusion and one principle of law. The factual conclusion was that Mr. Hall, in relying solely upon the 1967 opinion of COG, had made no independent determination of his own as to whether the bridge project, in 1969, could be said to be "based" upon "continuing" transportation planning as it existed in the area in 1969. The court of appeals then applied the legal principle that the statute "does not permit the Department to delegate its statutory responsibility to a local planning agency" (P.A. 13a) and concluded that, since that was what Mr. Hall had done; the matter would have to be remanded to DOT for a reevaluation of the project under § 134. It should be emphasized that the instant petition does not challenge either the factual conclusion or the legal ruling which led to the decision to remand, so that the mandate of the court of appeals would be totally unaffected by whatever action might be taken by this Court.[22]

The petition now insists that "at bottom" the court of appeals held that no § 134 approval can be given to a Fed-

[22]In fact, the only quarrel which petitioners now have with the court of appeals under § 134 concerns one of several "misgivings" expressed by the court in a postscript designed "to aid the Department's re-determination under § 134" after the remand (P.A. 13a-14a). It was the court's view that, since "the planning" of the bridge, "including the approaches and access roads," had not been "finalized" in 1969 (P.A. 3a), Mr. Hall could not have been sure, in September 1969, what sort of a traffic facility would eventually emerge from the project-planning process, and it seemed possible to the court that the relationship between the project planning and area transportation planning would change as the project plans evolved. For that reason, said the court, it is difficult to see, "*without some explanation*," how the § 134 determination could be made in this case "*before* plans for the bridge are finalized," adding that in some circumstances such a determination *might* properly be made "in advance of the completion of planning" (P.A. 14a n.42; emphasis added). All that the court was saying, in other words, was that, after the remand; if DOT wanted to make the required § 134 determination before the project plans were finalized, it would be well advised to provide "some explanation" in order to eliminate a possible question as to whether or not it had properly complied with § 134.

eral-aid highway project "until the final plans are drawn" (Pet. 8-10). That is not correct. The court reached a conclusion of non-compliance with § 134 on a wholly independent and adequate ground (DOT's improper delegation) which had nothing to do with the presence or absence of "final plans" and which is not challenged here. The only § 134 aspect of the decision below which *is* challenged here is a statement of purest dictum—and an eminently sensible statement at that.[23]

2. 23 U.S.C. § 109 (the Requirement That the Project be "Safe")

Section 109(a) requires in effect that, before DOT can approve plans and specifications for a highway project, it must make a factual determination that the project as planned and designed will be "safe."

(a) *The facts*

The evidence adduced at trial raised three distinct questions as to the safety of the project as approved by DOT in August-September 1969:

—In the period from mid-1968 through trial in mid-1970 the responsible DOT officials were deeply and continuously concerned about this "extremely hazardous" project (P.A. 138a-43a). For that reason the district court found that as of September 1969 there was a substantial and unresolved question as to whether the bridge structure would be safe, and on that ground alone the district court enjoined petitioners from constructing any "integral" part of the bridge facility "until the responsible officials are convinced that *the entire facility* as planned is structurally feasible" and therefore "safe" (P.A. 144a; emphasis added). That conclusion was affirmed by the court of appeals (P.A. 15a) and is not challenged by petitioners.[24]

[23] *See* preceding footnote.

[24] In view of the district court's unchallenged ruling that petitioners had violated § 109 in entering into the construction contract of September 1969, the petition is wholly incorrect in stating that "[t]he district court held that the Department had *properly* let" the con-

—Respondents proved at trial by undisputed evidence that there was a substantial question as to whether the air pollution associated with the bridge project might create a safety hazard (Tr. 415Q, 416-17), and it was also undisputed that petitioners had made "no study of the possible air pollutional effects of the bridge project" (P.A. 104a). It was held by the court of appeals that, since DOT was going to have to reconsider the entire safety situation on remand in any event, it should be required to make at least some evaluation of possible pollution hazards before approving the project under § 109 (P.A. 17a & n.49). This ruling also is not challenged by petitioners.

—The evidence at trial raised a question as to whether DOT, before authorizing actual construction work, had adequately investigated the adequacy of the river bed to support the proposed bridge piers and structure. The evidence showed, among other things, that foundation conditions in the Potomac River have historically been a serious problem[25] and that at the time DOT authorized construction of the piers to proceed, it was not known whether or not the foundation conditions at the site were such as to permit the proposed bridge structure to be built (P.A. 137a-38a). Although these facts were not in dispute, the district court took the view that these open and unresolved questions as to the safety of the foundations of the bridge did not *by themselves* preclude approval of construction under § 109.[26]

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tract (Pet. 10) and that the district court made a "finding of compliance with §109(a)" (Pet. 10-11).

[25] *See, e.g.*, Tr. 601; PX 40, 61.

[26] However, the district court also held, as indicated above, that the open and unresolved questions as to the engineering feasibility of the superstructure *did* preclude such approval and required a remand of the safety issue to DOT.

(b) *The holding of the Court of Appeals*

The court of appeals took no position on the correctness of the trial court's ruling that the unresolved questions concerning the river bed were not sufficient in themselves to bar approval under § 109 in September 1969. Rather, since petitioners' alleged approval under § 109 had already been set aside on independent grounds not challenged here, and since a remand to DOT was thus necessary in any event, the court merely directed DOT's attention to an additional question to be considered on the remand:

> "The District Court's findings are not entirely clear as to whether questions about the safety of river bed conditions could be more fully resolved before construction resumes. We hold that *if* such questions do exist, the Secretary must take steps to resolve them to the fullest *practical* extent before granting approval of the project under § 109(a)." (P.A. 16a; emphasis added).

The petition seriously mischaracterizes the court's decision. It says that the court of appeals held that § 109 requires that "final plans" be prepared, that "all safety testing be done," and that final "conclusions . . . be reached 'on paper' " before any building can begin (Pet. 11). In fact, however, the court of appeals did not even consider any generally applicable rule as to the temporal relationship between the preparation of "final plans" and the required safety determinations. Insofar as challenged here the holding was simply that in this case, where a genuine safety problem had admittedly once existed with respect to physical foundations, the problem must be investigated, *if* it still exists, "to the fullest practical extent" before construction proceeds—a proposition which would seem to be compelled by common sense alone.[27] As far as § 109 is concerned,

[27] The district court itself observed that "[b]*efore* the construction of a bridge, it is *necessary* to make extensive investigations of subsurface conditions to determine if they are sufficient to support the foundations for the bridge piers" (P.A. 137a; emphasis added).

only this last conditional holding is challenged now, and a reversal by this Court would not alter the necessity of a remand to DOT.

3. 23 U.S.C. § 138 (the Requirements for the Protection of Park Lands and Historic Sites)

Section 138 of Title 23 prohibits the Secretary from allowing a Federal-aid highway project to be constructed through park lands or historic sites unless and until he has found (1) that "there is no feasible and prudent alternative to the use of" such park lands or historic sites and (2) that the proposed project includes "all possible planning to minimize harm" to such lands.[28] Respondents contended below that in this case the Secretary had not properly made either of the required determinations, and both of those issues were discussed at length in the court of appeals' opinion. The instant petition, however, is directed only to the second of the two issues—namely, whether the Secretary could have properly concluded in August 1969 that the proposed bridge project included "all possible planning to minimize harm" to the park lands and historic sites which would be affected by the bridge and its connecting ramps and interchanges.

(a) *The facts*

The facts relating to the Secretary's alleged "all possible planning" determination are as follows:

—In August 1969, when the Secretary claims to have made his determination that "all possible planning" had been done, neither DOT nor anyone else knew what kind of a bridge would ultimately be built across the river (*see* pp. 5-9 *supra*). Since the type, size, and location of connecting ramps and interchanges would necessarily depend upon the type, size, and location of the bridge itself (none of which had yet been determined), any existing,

[28] *See generally* Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971).

notions as to the nature of those ramps and interchanges would necessarily have been entirely speculative.

—The Secretary testified vaguely that there had been some "preliminary planning" done with respect to the ramps and interchanges to be built upon the park lands and historic sites (P.A. 103a), but under subpoena DOT was unable to produce any such "preliminary plans" or other pertinent documents.[29] The Secretary then formally admitted below that there were none,[30] and none are in the record.[31]

—The district court found, with the concurrence of the court of appeals, that as of August 1969 no "designs" for such ramps and interchanges had been developed; such design work remained to be done in the future (P.A. 103a).

—It is clear that in August 1969 DOT did not know what sort of "harm" would be done by the bridge project to the affected park land and historic sites (the essential environmental elements involved), because four months later DOT still did not know what sort of bridge, ramps and interchanges would be built and could not accurately determine (in its own words) "the impact of . . . [this] massive structure upon the environment . . ." (PX 107).

—The petition states flatly, and without record citation, that "the impact that the bridge and its approaches . . .

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[29]The petition states that Mr. Volpe had before him "an artist's rendering" of the bridge (Pet. 12), citing Tr. 723, 728, and 804, but neither those pages of the transcript nor any others support the proposition that Mr. Volpe examined any "artist's rendering" at the time of his § 138 action. Moreover, there was no "artist's rendering" that gave any indication of the arrangement of connecting ramps and interchanges and their impact on protected lands. *See* p. 6 *supra*.

[30]Volpe Admission No. 3.

[31]The petition states that Mr. Volpe testified "that the approaches had been narrowed to two alternatives" (Pet. 12). However, all Mr. Volpe actually said was that "there are really only about two ways" by which "you can get traffic on to a bridge and off . . ." (Tr. 737), and neither Mr. Volpe nor any other witness ever explained what those "two ways" were.

[would] have on parklands . . . [was] known" to the Secretary in August 1969 (Pet. 13). That is not in accord with the record.[32] As indicated immediately above, the "impact" was very much in doubt both in August 1969 and four months later, and at the time of trial (June 1970) neither Mr. Volpe nor any other witness could say how much or which park land would be affected by the bridge and its ramps and interchanges, or in what manner (PX 157, pp. 30-31; Tr. 543, 546, 621).[33]

In view of the foregoing, the district court found as a fact, with the concurrence of the court of appeals, that in August 1969 Secretary Volpe did *not* conclude that "all possible planning to minimize harm" to the park lands had *already* been done; according to both courts, the only conclusion that Mr. Volpe reached on that subject in August 1969 was that he was personally "satisfied . . . that the designs which *would* be developed [in the future] . . . *would*

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[32] The petition states, surprisingly, that "[j]udicial notice may be taken of the fact that any bridge constructed across the Potomac River between Virginia and the District of Columbia will necessarily encroach on parkland" (Pet. 12 n.9). Not only would this be a misapplication of the doctrine of judicial notice, but the record refutes the asserted proposition (Tr. 160-61). Moreover, even if the proposition were correct, the fact that it might be necessary for the project to impinge upon *some* park land does not negate the obvious fact that the harmful impact will vary according to the different possible plans for the structures to be built on the park lands involved. Finally, there are obviously some alternatives to the bridge project (*e.g.*, a tunnel, *see* P.A. 100a) which need not have *any* adverse impact on park lands or historic sites.

[33] There were also other deficiencies in DOT's consideration, as of August 1969, of the environmental impact of the bridge project. For example, both courts below agreed that DOT had never undertaken a study of the possible air pollutional impact upon the park lands and historic sites (P.A. 11a, 104a), and both courts also agreed that petitioners had failed to conduct customary and legally-required consultations with the Advisory Council on Historic Preservation, *see* 16 U.S.C. § 470f (P.A. 11a, 104a), and other planning agencies (P.A. 11a, 104a).

result in a "minimum taking of parkland" (P.A. 10a, 103a; emphasis added).

(b) *The holding of the Court of Appeals*

In reviewing the foregoing facts the court of appeals took note of this Court's admonition in *Overton Park* "that § 138 can be obeyed 'only if there *has been* all possible planning to minimize harm to the park'" (P.A. 10a), and with that admonition in mind the court concluded that in this particular case "the necessary planning"—*i.e.*, the planning necessary to provide a basis for a conclusion that there *had been* "all possible planning to minimize harm"—had not been done *(ibid)*. In short, said the court, in the peculiar circumstances here involved the Secretary's approval of the bridge project in August 1969 was in fact "premature" (P.A. 11a).[34] Nothing in the opinion purports to lay down

[34] In commenting upon this holding the petition seizes upon the court of appeals' comment that "[a]bsent a finalized plan for the bridge, it is hard to see how the Department could make a meaningful evaluation of 'harm'" (P.A. 11a), and from that comment the petition draws the conclusion that the court was laying down the general principle of law that the Secretary can *never* validly approve a park-invading highway project until after the preparation of completely "finalized plans"—complete to the point of showing such engineering details as "reinforcing rods or the placement of rivets" (Pet. 13). We submit, however, that that is hardly a fair reading of the court's opinion. To the contrary, referring to all of "the applicable statutory provisions" of Title 23, including § 138, the court stated in effect that, in speaking of "final plans," it meant only plans which were sufficiently complete to permit meaningful appraisal in light of the statutory criteria, and that, once such plans had been thus completed, DOT could make its determinations under Title 23 even though some details or "ambiguities" might remain to be resolved at a later date (P.A. 14a n.42). In other words, as the court of appeals saw the issue, the only question before it was whether, in the circumstances of this particular case, DOT had done *enough* planning to permit it to determine that the harm to be done to the park lands and historic sites was at a minimum—and in this particular case the court reached a negative conclusion on that factual question.

any general rule of law as to when a § 138 determination is "premature" and when it is not.

It is apparent, moreover, that even if this Court should review the court of appeals' factual conclusion as to "prematurity" and disagree with it, such a reversal would have no effect upon the mandate below. The reason is that it is now very clear that in August 1969, when Secretary Volpe claims to have made his dual determinations under § 138, he applied the wrong legal standards in making his alleged determination with respect to "feasible and prudent alternatives." That this is so is demonstrated by the following: (1) Mr. Volpe's alleged § 138 determinations with respect to the Three Sisters Bridge were made shortly *before* his equivalent determinations in the *Overton Park* case (and long before this Court's instructive decision in that case), and (2) it has since been established at trial in the *Overton Park* litigation that in the period here involved the Secretary was in fact employing the wrong legal standards in making his "prudent and feasible alternatives" determinations under § 138.[35] The result is that, even if this Court should reverse the only aspect of the § 138 holding challenged in this case (*i.e.*, the court of appeals' conclusion with respect to "all possible planning"), the Court would nevertheless have to leave in effect the mandate requiring the Secretary to reconsider the § 138 question in accordance with the proper legal standards which this Court enunciated in *Overton Park*.

[35] Following this Court's *Overton Park* remand the trial court in that case found, on the basis of Mr. Volpe's testimony, that Mr. Volpe's interpretation of § 138 in 1969 was contrary to this Court's authoritative ruling. Citizens to Preserve Overton Park, Inc. v. Volpe, 3 E.R.C. 1510, 1514-16 (W.D. Tenn. Jan. 5, 1972). Moreover, on the basis of a record remarkably similar to this one, the court found the evidence "overwhelming" that Mr. Volpe had not considered alternative locations, despite his affidavit and testimony that he had. *Compare* 3 E.R.C. at 1513-14 *with* P.A. 92a-93a & n.31. Apparently accepting the court's ruling, Secretary Volpe has since announced that a thorough reconsideration will be made of both the location and design of Interstate Route 40 in Memphis (O.A. 4a-5a).

4. 23 U.S.C. § 128 (the Requirement of a Public Hearing As To Location)

In the proceedings below respondents raised three independent questions as to petitioners' compliance with 23 U.S.C. § 128 and DOT's implementing regulation thereunder. The courts below concluded that respondents were right on two of those three issues,[36] and those conclusions are not challenged by petitioners. The remaining § 128 issue arose under DOT's implementing regulation, so-called PPM 20-8, which provides that where changes are made in the location of a proposed highway project, "[b]oth a corridor public hearing and a design public hearing must be held" if any one of three conditions exists:

> "[Where the project] (1) Is on a new location; or (2) Would have a substantially different social, economic or environmental effect; or (3) Would essentially change the layout or function of connecting roads or streets." PPM 20-8, ¶ 6a (O.A. 3a).

The regulation further provides that in the event of "doubt as to whether a public hearing is required," then "[t]he opportunity for a public hearing *shall* be afforded . . ." PPM 20-8, ¶ 7a (O.A. 3a).

Although the petition never refers to the requirements of this regulation, petitioners are apparently asking this Court to review the court of appeals' decision concerning the regulation's application to the facts in this case.

(a) *The facts*

In 1964 the District Government held a public hearing with respect to three possible locations for a proposed "Potomac River crossing."[37] Of those three locations, the

[36] *See* p. 13 n. 19 *supra*.

[37] The petition errs in stating that the 1964 hearings covered "locations all the way from the vicinity of Theodore Roosevelt Island to Key Bridge to a location 2400 feet upstream from the Three Sisters Islands" and that they therefore covered "every conceivable location" (Pet. 14). In fact, the 1964 hearings covered only three specific locations (P.A. 111a); and consultants to the District Government,

one closest to the location proposed for the bridge project in 1969 was more than one-quarter of a mile downstream from the 1969 location; and the 1964 proposal contemplated substantially different "approaches" to the bridge itself.[38] The change in location also produced different "social, economic or environmental effects," as those terms are defined in the regulation (P.A. 128a-29a; O.A. 2a-3a). Indeed, the trial court found that, as compared with the alternatives considered in 1964, the 1969 proposal contemplated "a different bridge" which would use "[d]ifferent parkland and a different quantity of parkland . . ." (P.A. 131a-32a).

Given this state of the record, both courts below found it unnecessary to consider the legal question that arises under the regulation where (a) a public hearing has been held with respect to a particular location and (b) the highway officials involved decide, after the hearing, to change the location of the project. Both courts below agreed that regulation embodied the following companion principles of law: (a) that if the change in location was "so insubstantial that the public would not be affected any differently than by the original proposal which formed the basis for the first hearing," a new hearing would not be required, but (b) that if in fact the change was so substantial that the public would be affected differently by the new proposal, a new hearing would be required (P.A. 19a, 112a).

The district court reached the conclusion that the first of the foregoing two principles was applicable in this case. In other words, despite its acknowledgment of some differences in effects, it concluded without citation to the

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among others, have suggested additional feasible locations for a bridge crossing in the same area, none of which was considered at the 1964 hearings (Tr. 1596-98; PX 2, 3, 6).

[38] Both the district court and the court of appeals agreed that the evidence showed that between 1964 and 1969 changes had been made in the plans for the routing of traffic to and from the bridge and its connections (P.A. 19a, 114a-16a).

record that the location of the bridge project (including its ramps and interchanges) as proposed in 1969 would in fact have no different impact upon the public than the location of those facilities as considered at the 1964 hearing, so that no new location hearing would be required.

(b) *The holding of the Court of Appeals*

Focusing squarely on the last-mentioned factual conclusion of the district court—*i.e.*, that the 1969 proposed location would have no different impact on the public than the 1964 proposed location—the court of appeals could find nothing in the record "to support the conclusion but the conclusion itself" (P.A. 19a), and it therefore conditionally remanded this issue to the district court "for clarification of the factual basis of its conclusion" (P.A. 19a-20a).[39]

The petition's discussion of the foregoing holding is remarkable. It says that the court of appeals "set aside" the district court's ruling and held (a) that a location hearing can properly be held "only after final plans [for the project] have been made," and (b) that whenever a "minor" change is made in the "final plans" presented at the location hearing, a new location hearing must be held (Pet. 14). In fact the court of appeals said nothing of the kind. It did not even discuss "final plans" in its ruling with respect to location hearings, and it made clear that a "minor" change in location, which would not have a significantly different impact upon the public, would *not* require the holding of a new location hearing.[40] If this Court were now

[39]The remand was conditional in that the court of appeals recognized that the required "clarification" might become unnecessary if (for example) petitioners' compliance with *other* provisions of Title 23 required a location change for other reasons (P.A. 19a-20a).

[40]Thus the court of appeals explicitly stated that it had "no quarrel" with the district court's statement that no new location hearing is required where only an "insubstantial" change in plans is involved (P.A. 19a).

to review the location-hearing issue presented here, the Court's sole function would be to decide, not an issue of law, but only whether the particular evidentiary record in this case provided support for a specific factual conclusion voiced by the district court.

REASONS FOR DENYING THE WRIT

Petitioners assert that this case involves two sets of issues, each of which deserves review on certiorari: (1) four issues arising under Title 23 of the United States Code and (2) a single issue with respect to the interpretation of § 23 of the 1968 Highway Act. As to *neither* set is it contended that the decision below conflicts with other judicial decisions or that it constituted a departure from the accepted and usual course of judicial proceedings. The petition asserts only one recognized reason for granting certiorari—that the case involves important questions of Federal law that should be settled by this Court—but even that contention is advanced only as to the first set of issues and not as to the second. As to the latter question, petitioners' only argument is that the ruling below on a question of purely local law was in error, which is hardly a ground for seeking certiorari. As to the first set of issues (the Title 23 issues), no important question of Federal law is presented by the petition.

Moreover, it is important to recognize that the opinion of which review is now sought dealt with only *some* of the issues raised on the appeal below and was not the court's final decision. The court of appeals below deferred consideration of certain additional issues, as to which additional briefing was desired (P.A. 23a), and the eventual supplementary opinion by the court of appeals on the unresolved issues may well render the questions raised by the instant petition entirely moot as a practical matter.

A. THE ISSUES ARISING UNDER TITLE 23 OF THE U.S. CODE

1. Review and Reversal of the Dicta and Limited Factual Conclusions Challenged Here Would Be Useless

Three of the four Title 23 provisions upon which petitioners here rely (§§ 134, 109, and 138) required DOT to make certain factual determinations before allowing construction of the bridge project to proceed, and under *each* of those three provisions it was concluded below that there were problems involved which had not been adequately considered in the first instance so that a remand for reconsideration by DOT was required. Of those three "remands," however, not *one* would be affected by review by this Court because each rested upon an independent and adequate ground which is not now challenged by petitioners (*see* pp. 16, 17, 24 *supra*). This Court has long recognized that in such circumstances, since the most that could be accomplished by this Court's review would be "a useless and profitless reversal"—such review is wholly inappropriate.[41]

Moreover, the petition itself makes clear that its attack upon the court of appeals' handling of the Title 23 issues is purely factual; summarizing their Title 23 argument as a whole, petitioners "submit that, with respect to each of the Secretary's determinations, *the information before him was adequate*" (Pet. 7), which means that petitioners are simply asking this Court to review the particular evidentiary record presented in this unique case and to decide whether or not the particular "information" involved was "adequate" in

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[41] *See* Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 635-36 (1875); Fox Film Corp. v. Muller, 296 U.S. 207, 210 (1935). Review in such circumstances could give rise "to nothing more than an advisory opinion." Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945); Fay v. Noia, 372 U.S. 391, 428-30 (1963).

fact.[42] It has long been the policy of this Court, however, "not [to] grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

2. The Resolution of this Extraordinary Controversy Can Have No Effect As a Precedent for the Future

As should be apparent from the previous detailed discussion of the facts in this case, the official conduct involved is unique in the history of the Federal highway program. It is inherently improbable that any repetition would ever occur as a practical matter, and it is also the fact that there have been recent developments in the law which make any real repetition virtually impossible.

For example, it is now conceded that in 1969 the Secretary of Transportation, in making determinations under 23 U.S.C. § 138, was applying legal standards which were subsequently determined to be erroneous in the *Overton Park* litigation and that he was making his determinations without utilizing any administrative record and without preparing any kind of written findings or other record.[43] Recently, however, the erroneous legal criteria in use in 1969 have been

[42] Presumably the petitioners' argument, as so summarized, relates to 23 U.S.C. §§ 134, 109, and 138 and does not relate to § 128 but the issue presented under the latter provision is equally factual. As noted above, petitioners' only quarrel with the opinion below, as it relates to § 128, is with the court's statement that it could not accept, without further "clarification of the factual basis," a particular factual conclusion reached by the district court *(see* p. 27 *supra)*, which means that as to § 128 petitioners are asking this Court to grant certiorari merely for the purpose of determining whether the particular record in this case does or does not include evidence on a particular subject.

[43] In this case, for example, the Secretary had no administrative record before him when he allegedly approved the bridge project under § 138, and he claims to have made a purely "mental" finding without ever recording it or telling anyone he had made it (P.A. 92a).

set to one side,[44] and the Secretary has promulgated a whole new set of procedural regulations requiring the preparation of an extensive administrative record and detailed findings of fact with respect to the environmental issues posed under § 138.[45] The former comparatively casual approach taken by the Secretary with respect to § 138 problems, as exemplified in this case and in *Overton Park*, simply cannot be repeated, which means that review of that outmoded conduct now would have absolutely no significance for the future administration of the Federal highway program.

Similarly, significant legislative changes have subsequently been made in the requirements of the other three Title 23 provisions upon which petitioners here rely (§§ 109, 128, and 134),[46] and little would now be gained by review of the provisions as they existed before amendment.

3. The Narrow Factual Statements Challenged Here Were Clearly Correct

Once the record facts and the actual conclusions of the court below are clearly explained—as we have tried to do in our rather lengthy "Counterstatement"—we think that the petitioners' claims of certiorari-deserving error are hard to take seriously. For example, was it really error for the court of appeals to suggest to DOT that, when it reconsiders its alleged determination under 23 U.S.C. § 134 (as it must do, for reasons not now challenged by petitioners), DOT should make sure that sufficient planning has been done to provide a proper basis for the required determination? (*See*

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[44] *See* the Secretary's statement at the conclusion of the *Overton Park* litigation (O.A. 4a-5a).

[45] *See, e.g.*, DOT Order 5610.1 (Oct. 7, 1970), (referred to in *Overton Park*, 401 U.S. at 417-18 and nn. 31-32); DOT Policy and Procedure Memorandum 90-1 (Aug. 24, 1971) (reprinted at 117 Cong. Rec. E. 11596 (daily ed. Nov. 1, 1971)).

[46] *See, e.g.*, §§ 135, 136, 143, Pub. L. No. 91-605, 84 Stat. 1713 (1970). *See, also* National Environmental Protection Act, 42 U.S.C. § 4331.

P.A. 13a-15a; pp. 15-17 *supra*) Was it really error for the court of appeals to say that after the necessary remand under § 109; *if* unresolved safety questions still exist as to the bridge's foundations, they should be resolved "'to the fullest practical extent'" before construction? (*See* P.A. 16a; pp. 19-20 *supra*) Was it clearly erroneous for the court of appeals to conclude, factually, that in the peculiar circumstances of this case, where there had been no meaningful evaluation of the environmental impact of the bridge project, the Secretary's approval of the project under § 138 was "premature"? (*See* P.A. 10a-11a; pp. 23-24 *supra*) And finally, under § 128, when the district court had asserted a factual conclusion as to the value of a public hearing without citing any factual support therefore, was it really error for the court of appeals to remand the issue to the district court "for clarification of the factual basis of its conclusion"? (*See* P.A. 19a-20a; pp. 27-28 *supra*) We think these questions not only answer themselves in the negative but that the very statement of these essentially factual issues the only ones posed by the petition demonstrates the inappropriateness of their review by this Court.

B. THE ISSUE UNDER SECTION 23 OF THE 1968 HIGHWAY ACT

1. Petitioners Have Not Even Attempted To Show That This Purely Local Issue Meets the Usual Criteria for Review on Certiorari

The most striking aspect of petitioners' discussion of § 23 of the 1968 Highway Act is that there has been no attempt whatever to claim that the issue meets any one of the usual criteria for certiorari review. It is not even claimed that the issue is "important," either in the administration of the Federal highway program or otherwise. Petitioners' sole argument is that the court of appeals below has interpreted the statute erroneously.

Moreover, review of the issue posed by the petition under § 23 of the 1968 Highway Act would be inappropri-

ate for the simple reason that the statute, as challenged here, is a purely local statute relating to a single local highway project which has no national implications of any kind. The highest court of the District of Columbia has interpreted this District of Columbia statute for purely local purposes, and it has been the long-standing policy of this Court not to review such local decisions. *Del Vecchio v. Bowers*, 296 U.S. 280, 285 (1935); *General Motors Corp. v. District of Columbia*, 380 U.S. 553, 556 (1965).

2. Petitioners Seek Review at An Inappropriate Time

The § 23 ruling for which review is now sought was *not* made in the opinion below (dated October 12, 1971); it was enunciated on April 6, 1970, in a prior appeal (Pet. 4).[47] Petitioners sought rehearing as to the 1970 decision, but they did not then seek review of that decision by this Court. They acquiesced in the remand for trial, went to trial, and lost. On the second appeal (the proceeding below) they attempted to reopen the § 23 question, but in the latter proceeding the new panel of the court of appeals quite properly regarded the question as "no longer open" (P.A. 2a).

In the circumstances, we submit, the same must be said of the issue as now raised by petitioners. Whether or not they have technically waived their claim for review of the issue now (through their failure to seek review of the question when it was actually decided), review at this point in time would clearly be contrary to sound principles of judicial economy and administration.[47]

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[47] Following the court of appeals' opinion of April 6, 1970, at which time the court made its only decision on the § 23 issue, an enormous amount of time and effort was devoted to the case (through pretrial discovery, trial, and subsequent appellate proceedings) by the district court, the court of appeals, and all of the litigants involved (Pet. 4). If this Court were now to review and reverse the 1970 appellate determination as to the effect of § 23 of the 1968 Highway Act, all of that time and effort would have been wasted.

3. Petitioners' New-Found Interpretation of Section 23 Is Inconsistent with Their Own Long-Standing Administrative Interpretation and Is Plainly Wrong.

Petitioners now contend that, insofar as the bridge project is concerned, § 23 of the 1968 Highway Act excused them from complying with all four of the Title 23 provisions discussed in the petition (Pet. 16). That is squarely contrary to the position which they adopted both before and during this litigation. Specifically, (a) immediately after the passage of § 23 of the 1968 Highway Act, DOT itself interpreted that statute as requiring compliance (as to the bridge project) with 23 U.S.C. § 134 (*see* pp. 9-10 *supra*), and DOT has claimed in this case that in September 1969, feeling obliged to comply with § 134, it did so in fact (*see* p. 15, *supra*); (b) in the proceedings below petitioners expressly conceded the applicability of §§ 109 and 138 to the bridge project[48] and claimed that they complied in August-September 1969 (*see* pp. 17-18, 20-22 *supra*); and (c) in October 1969, DOT itself ordered the District Government to take the actions which DOT considered necessary to comply with § 128.[49]

The petition now presents a new theory to the effect that, despite petitioners' own prior administrative interpretation and attempted compliance, the four cited provisions were never applicable to the bridge project in the first

[48] *See* Dist. Defs. Mem. in Support of Defs. Motion for Summary Judgment (p. 11) in which it was expressly stated that "there is no doubt" that §§ 109 and 138 are "applicable" to the bridge project within the meaning of § 23 of the 1968 Highway Act.

[49] In September-October 1969 an official of DOT discovered that the District Government had not made the certifications required by § 128 and requested that the District Government make those certifications immediately (P.A. 134a; Tr. 446-47, 455-56, 1112). The district court found as a fact (in a finding which petitioners have never subsequently challenged) that the District Government's subsequent certification was made "for the purpose of complying" with § 128 but that the certification was without factual basis and was invalid (P.A. 134a-36a).

place. The theory is that in providing (in § 23) that some unspecified type of "work" on the bridge project begin within 30 days, Congress knew that the project had already been "planned," that Congress therefore wanted actual building to begin at once; and that Congress did not want petitioners to bother to comply with any highway law which would be either "time-consuming" or would require the "redoing" of things which had been done before the 1968 Act (Pet. 16-17). The factual premise (that the bridge project had already been "planned") is clearly wrong on the facts (*see* pp. 5-9 *supra*), and the resulting statutory interpretation is untenable on its face. For example, it obviously takes some amount of time to determine whether a project is safe under 23 U.S.C. § 109, but can it really be supposed that the Congress wanted DOT to proceed with a project which DOT considered "fraught with danger" without complying with this "time-consuming" provision?[50] Moreover, the court of appeals' 1970 decision that §§ 134, 109, 138, and 128 were applicable to the bridge did not in fact require petitioners to "redo" anything that had been done before § 23 was enacted; on the contrary, petitioners themselves have affirmatively claimed that virtually all of their compliance actions under those provisions were taken *after*, and not before, the passage of the 1968 Act.[51] Finally, petitioners' admittedly selective treatment of "only three" items from the complex legislative history involved

[50] Petitioners' theory rests upon constitutionally dubious assumptions as to who should decide which provisions were so "time-consuming" as to be inapplicable, and on what basis. Every provision of Title 23 is "time-consuming" to some extent, which means that under petitioners' theory the administrative officials would have had unfettered discretion to select for themselves the statutory provisions with which they wanted to comply and to set the rest aside. *But see, e.g.*, Panama Ref. Co. v. Ryan, 293 U.S. 388, 414-30 (1935); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495, 529-42 (1935).

[51] Petitioners cite only one specific instance of something that had been done before; they say that "[h]earings had been held" (Pet. 16). As explained above, however, the hearings which had been held four years prior to the 1968 Act had related to a bridge at a different location with different ramps and approaches (*see* pp. 25-27 *supra*).

(Pet. 17-19) has been advanced without any attempt to meet or answer the contrary conclusion, based upon the *entire* legislative history, which was reached by the court of appeals in the 1970 opinion as to which petitioners never sought review (P.A. 172a-79a).

CONCLUSION

For the foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

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February 1972

APPENDIX A

§ 23 of the Federal-Aid Highway Act of 1968 provides:

(a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section, and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects:

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section C1 to C4), terminating at Bladensburg Road.

(c) The government of the District of Columbia and the Secretary of Transportation shall study those projects on the Interstate System set forth in "The 1968 Interstate System Cost Estimate", House Document Numbered 199, Ninetieth Congress, within the District of Columbia which are

not specified in subsection (b) and shall report to Congress not later than 18 months after the date of enactment of this section their recommendations with respect to such projects including any recommended alternative routes or plans, and if no such recommendations are submitted within such 18-month period then the Secretary of Transportation and the government of the District of Columbia shall construct such routes, as soon as possible thereafter, as required by subsection (a) of this section.

Department of Transportation Policy and Procedure Memorandum 20-8 provides:

* * * * *

4. *Definitions.* As used in this PPM . . .

c. "Social, economic, and environmental effects" means the direct and indirect benefits or losses to the community and to highway users. It includes all such effects that are relevant and applicable to the particular location or design under consideration such as:

(1) Fast, safe and efficient transportation.
(2) National defense.
(3) Economic activity.
(4) Employment.
(5) Recreation and parks.
(6) Fire protection.
(7) Aesthetics.
(8) Public utilities.
(9) Public health and safety.
(10) Residential and neighborhood character and location.
(11) Religious institutions and practices.
(12) Conduct and financing of Government (including effect on local tax base and social service costs).
(13) Conservation (including erosion, sedimentation, wildlife and general ecology of the area).
(14) Natural and historic landmarks.

(15) Noise, and air and water pollution.
(16) Property values.
(17) Multiple use of space.
(18) Replacement housing.
(19) Education (including disruption of school district operations).
(20) Displacement of families and businesses.
(21) Engineering, right-of-way and construction costs of the project and related facilities.
(22) Maintenance and operating costs of the project and related facilities.
(23) Operation and use of existing highway facilities and other transportation facilities during construction and after completion.

This list of effects is not meant to be exclusive, nor does it mean that each effect considered must be given equal weight in making a determination upon a particular highway location or design.

* * * * *

6. *Hearing requirements.*

a. Both a corridor public hearing and a design public hearing must be held, or an opportunity afforded for those hearings, with respect to each Federal-aid highway project that:

(1) Is on a new location; or
(2) Would have a substantially different social, economic or environmental effect; or
(3) Would essentially change the layout or function of connecting roads or streets.

* * * * *

7. *Opportunity for public hearings.*

* * * * *

d. The opportunity for a public hearing shall be afforded in each case in which either the State highway department or the division engineer is in doubt as to whether a public hearing is required.

* * * * *

APPENDIX B

DEPARTMENT OF TRANSPORTATION

NEWS

OFFICE OF THE SECRETARY

WASHINGTON, D. C. 20590

FOR IMMEDIATE RELEASE
January 21, 1972

DOT 4-72
Phone: (202) 426-4321

Secretary of Transportation John A. Volpe announced today that, in response to a recent Federal court decision, he will review the entire record to determine whether Interstate 40 in Memphis, Tennessee, should be completed in accordance with a plan that would require use of a strip of land in Overton Park, a large public park in downtown Memphis.

The project has been the focus of much attention since it was first approved in 1969, and was the subject of a major Supreme Court decision. In March 1971, the Supreme Court ordered the District Court in Memphis to undertake a thorough review of the administrative record underlying the Department of Transportation's actions on the project.

On January 5, 1972, U.S. District Judge Bailey Brown remanded the project to Secretary Volpe for a new decision on the location of the highway. Judge Brown held that Secretary Volpe could not have based his 1969 approval on the standards spelled out by the Supreme Court in its decision in March 1971. As originally proposed, the $1.8 million, highway project would have required the use of a 29-acre strip of parkland three-quarters of a mile in length. Because the Supreme Court had not yet addressed the issue in 1969, Judge Brown wrote: "Secretary Volpe, if he did consider alternatives to the park route, must have, however understandably, applied an incorrect standard."

At issue is Section 4(f) of the Department of Transportation Act of 1966. The provision permits the use of public parkland for highway purposes only when the Secretary finds that there is "no feasible and prudent alternative" and that the project includes "all possible planning to minimize harm" to the parkland.

Commenting on Judge Brown's decision, Secretary Volpe said: "I have asked for a complete analysis of the entire record that was before the court, with particular attention to alternative locations for this highway. That analysis will be done in the context of a thorough, detailed environmental impact statement, which is required by the National Environmental Policy Act. Once this analysis is complete, a new decision will be made."

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Supreme Court, U. S.
FILED
MAR 11 1972
MICHAEL RODAK, JR., CLERK

No. 71-931

In the Supreme Court of the United States

OCTOBER TERM, 1971

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL., PETITIONERS

v.

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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SUPPLEMENTAL MEMORANDUM FOR THE PETITIONERS

The purpose of this memorandum is to advise the Court that a supplemental opinion and statement on the denial of rehearing (Appendix, *infra*) were filed in this case by the court of appeals on March 2, 1972.

The supplemental opinion holds that Section 23 of the Federal-Aid Highway Act of 1968 (Pet. App. 215a-216a), by its direction that construction of the Three Sisters Bridge go forward "* * * notwithstanding any other provision of law * * *," relieves

the petitioners of any obligation to comply with various provisions of Title 7 of the D.C. Code. The supplemental opinion thus removes what respondents contended was an obstacle to this Court's consideration of the case (Respondents' Brief in Opp. p. 28). The supplemental opinion and statement on the denial of rehearing do not in any other respect, appear to us to have any significant effect on the issues presented in the pending petition for certiorari.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

MARCH 1972.

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,838

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.,
APPELLANTS

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, ET AL.

No. 24,843

D. C. FEDERATION OF CIVIC ASSOCIATIONS, ET AL.

v.

JOHN A. VOLPE, SECRETARY OF TRANSPORTATION, APPELLANT

THE DISTRICT OF COLUMBIA, ET AL.
ROGERS C. B. MORTON, SECRETARY OF THE INTERIOR, ET AL.,
APPELLANTS

SUPPLEMENTAL OPINION AND STATEMENT ON THE DENIAL OF A REHEARING BY THE DIVISION OF THE DECISION OF OCTOBER 12, 1971

Filed March 2, 1972

Before BAZELON, *Chief Judge*, FAHY, *Senior Circuit Judge*, and MACKINNON, *Circuit Judge*.

SUPPLEMENTAL OPINION

FAHY, *Senior Circuit Judge*, with whom BAZELON, *Chief Judge*, *concurs*: Our decision in *D.C. Federation of Civic Ass'ns v. Volpe*, —— U.S. App. D.C. ——, —— F.2d —— (1971), issued October 12, 1971, was rendered on appeal by the plaintiffs in the litigation from the decision of the District Court in *D.C. Federation of Civic Ass'ns v. Volpe*, 316 F. Supp. 754 (1970). In important respects we agreed with the findings of the District Court in that case that the Secretary of Transportation had not complied with certain applicable provisions of Title 23 of the United States Code. We could not agree, however, with the rulings of the District Court that the Secretary in other important respects had met the requirements of Title 23. We accordingly remanded the case with directions that construction of the bridge be enjoined until those requirements are met, as set forth in our opinion.

The plaintiffs had also contended in the District Court that the defendants were required and had failed to comply with statutory provisions other than Title 23, including certain provisions of the Code of the District of Columbia. In rejecting this contention the District Court held that the project had been exempted by Section 23 of the Federal-Aid Highway Act of 1968[1] from compliance with all statutory provisions "other than those of Title 23 of the U.S. Code." Plaintiffs-appellants renewed their contention in this court. Because the parties had not squarely faced this problem in their briefs before us when we rendered our October 12, 1971, decision, we asked for supplemental briefs, which have been filed. We now decide the questions thus reserved.

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[1] P.L. 90-495, 82 Stat. 815, 827-28 (1968)

I.

The relevant provisions of Title 7 of the D.C. Code are §§ 108, 109, 113 and 122, briefly described in an Appendix to this opinion.[2] We have concluded, as more fully to be explained, that further compliance with these provisions is not required insofar as they apply to the Three Sisters Bridge project.

Section 23 of the Federal-Aid Highway Act of 1968 was the legislative response to the administrative decision of certain District of Columbia officials to abandon the bridge project, and in response also to the decision of this court in *D.C. Federation of Civic Ass'ns v. Airis*, 129 U.S. App. D.C. 125, 391 F.2d 478 (1968), requiring compliance with Title 7 of the D.C. Code, "particularly §§ 7-108 to 7-113." By Section 23, Congress directed that construction of the bridge go forward "notwithstanding any other provision of law or any court decision or administrative action to the contrary," subject, as we held in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), to compliance with the applicable provision of Title 23 of the United States Code.[3] This court pointed out in

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[2] In our October 12, 1971, decision we stated in this connection, at footnote 62, as follows: "At issue are 16 U.S.C. §§ 1, 470; 33 U.S.C. §§ 401, 403, and 525; 49 U.S.C. § 1655 (1970), and various sections of title 7 of the District of Columbia Code."

[3] The relevant portion of Section 23 of the 1968 Act is as follows:

> Sec. 23. (a) Notwithstanding any other provision of law, or any court decision or administrative action to the contrary, the Secretary of Transportation and the government of the District of Columbia shall, in addition to those routes already under construction, construct all routes on the Interstate System within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secre-

its opinion in that case that "it was Congress' intention to countermand the District Government's 'administrative action' which had stopped further interstate construction," adding in a footnote: "Presumably, the 'court decision' language [of Section 23] refers to our decision in *Airis*, but the reference is mistaken since that decision was not to the contrary." This court thus construed Section 23 in essence as a direction to the local and federal authorities to continue with the bridge plans formulated prior to *Airis*; but the court did not pass upon the precise question now before us, whether Section 23 exempted the bridge project from further compliance with those provisions of Title 7 of the D.C. Code which had been before the court in *Airis*. That case was not to the contrary of the intent of Section 23 that the bridge should be built; but the local Code provisions which had been held in *Airis* to be applicable to the bridge project we think became inapplicable by the subsequent enactment of Section 23 to the extent that com-

tary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. Such construction shall be undertaken as soon as possible after the date of enactment of this Act, except as otherwise provided in this section and shall be carried out in accordance with all applicable provisions of title 23 of the United States Code.

(b) Not later than 30 days after the date of enactment of this section the government of the District of Columbia shall commence work on the following projects.

(1) Three Sisters Bridge, I-266 (Section B1 to B2).

(2) Potomac River Freeway, I-266 (Section B2 to B4).

(3) Center Leg of the Inner Loop, I-95 (Section A6 to C4), terminating at New York Avenue.

(4) East Leg of the Inner Loop, I-295 (Section C1 to C4), terminating at Blatchsburg Road.

82 Stat. 827 (1968).

pliance with those provisions would conflict with the provisions of Section 23 that work on the bridge should commence within 30 days. The reasonable conclusion to draw now from the ambiguous situation presented seems to us to be that such compliance with those provisions as had not occurred by the end of the 30 day period does not constitute a condition to the approval or construction of the project. This does not preclude the authorities from taking advantage of any of the provisions which they might find to be desirable or useful in connection with the project.

II

We have not overlooked that appellants also invoke certain provisions of the D.C. Code other than those in Title 7, namely, D.C. Code §§ 1-1005(a), 1407(a)(7) and 8-115, also briefly described in the Appendix to this opinion. We did not include these provisions among those which our October 12, 1971, decision reserved for further consideration. *See* footnote 2, *supra*. Nevertheless, we consider them. The issue as to their applicability to the project had been presented to the court in *Airis*, although they did not surface in the opinion. We think they are also fairly included in the target of Section 23. Even were we to interpret the omission from the *Airis* opinion of any discussion of these provisions to mean that the court regarded them as applicable to the bridge project, we nevertheless think the impact of Section 23 upon these provisions is the same as we have construed its impact to be upon the Title 7 provisions, as above set forth. The language of Section 23, and its history and objective, persuade us that the overriding intention of Congress was also to exempt the project from the necessity of further compliance with these recommendatory and consultative provisions of the local Code.[4]

[4] We are of course not called upon to pass upon any provi-

Clearly one of the objectives of Congress was to have the bridge project go forward promptly. The "notwithstanding • • • any law • • • to the contrary" language, construed in light of this objective, and of the history of the project, bears a construction that the provisions of the D.C. Code now considered should not delay or bar the authorities from proceeding. As we explained, however, in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), Congress did not intend that the bridge should go forward without complying with "all applicable provisions of Title 23 of the United States Code." Those provisions having been brought into Section 23 itself, were not to the contrary of Section 23.

III

We consider finally whether the appellees must comply with 16 U.S.C. §§ 470, 470f, which are part of the United States Code. Only Section 470f is really involved. It provides that in the case of a project such as the Three Sisters Bridge the head of the Federal Agency having direct or indirect jurisdiction, prior to the approval of the expenditure of any federal funds on the undertaking, shall take into account the effect of the undertaking on any site that is included in the National Register of historical sites, and shall afford the Advisory Council on Historic Preservation, established under Title 16, a reasonable opportunity to comment on the undertaking. This provision was not considered in *Airis* and it is not a local highway statute. It is a part of a national plan to protect historic sites. Section 23 of the 1968 Act was passed, as we understand its purpose, to free the bridge from further planning under the local statutes. We cannot say that Congress also intended to render inapplicable this federal law of general application affecting historic sites. The Sec-

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sions of law not invoked by appellants, whether local or otherwise.

retary of Transportation is a member of the Advisory Council on Historic Preservation created by 16 U.S.C. § 470. Accordingly, if he has not already done so since our decision in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970)—we understand he may already have done so—the Secretary is required to comply with Section 470f before final approval of the project, for areas affected by the bridge project are listed in the National Register.[5]

As to 33 U.S.C. §§ 401, 403 and 525, and 49 U.S.C. § 1655, referred to in footnote 1, *supra*, apparently appellants and appellees agree that the authorities have complied with these provisions. No issue with respect to them is raised on this appeal.

Judgment accordingly

[5] The 1968 correspondence to which Judge MacKinnon refers in this connection is inconclusive in its submission to the Advisory Council and in the Council's response.

APPENDIX

7 D.C. Code § 108 prohibits the construction of any highway in the District at a width of more than 160 feet.

D.C. Code §§ 7-109, 7-115 and 7-122 require that whenever the D.C. Government proposes a new highway plan, the plan must be the subject of a public hearing with notice given to the affected landowners. A map reflecting the plan shall be prepared and certified to the National Capital Planning Commission for modification and approval, followed by filing and recording with the District Surveyor.

D.C. Code § 1-1005(a) requires any agency of the District Government, when it plans a new highway project, to consult NCPC in an effort to conform agency plans with over-all NCPC planning for the National Capital.

D.C. Code § 8-115 authorizes Federal and District authorities administering U.S.-owned property to transfer jurisdiction over such properties, for purposes of administration and maintenance, among themselves, provided the recommendation of the NCPC is first secured and that all such transfers are reported to Congress.

D.C. Code § 1-1407(a)(7) requires the District to submit its plans for highway projects to WMTA for its review. (This provision repealed Dec. 9, 1969, P.L. 89-774, § 8(a)(1), 83 Stat. 322.)

16 U.S.C. § 470f, requires the Secretary of Transportation to give the Advisory Council on Historic Preservation a reasonable opportunity to comment on plans for an interstate highway project that will affect historic areas in the National Register.

MacKinnon, *Circuit Judge*, concurring specially and dissenting in part: I concur in the Supplemental Opinion of Judge Fahy except to the extent that it differs from my prior dissenting opinions in *D.C. Federation of Civic Associations* v. *Volpe*, 140 U.S.App.D.C. 162, 434 F.2d 436 (1970) and *D.C. Federation of Civic Associations* v. *Volpe*, —— U.S.App.D.C. ——, —— F.2d —— (Nos. 24838 & 24843, dissenting opinion filed 11/4/71), and to my views herein expressed.

Judge Fahy's opinion at pages 4-5 would have initially exempted the Three Sisters Bridge project from compliance with those provisions that would conflict with the provisions of section 23 of the Highway Act of 1968 so that work on the bridge could have commenced within thirty days. That date having passed he now concludes that compliance with those provisions as had not occurred by the end of the 30-day period does not constitute a condition to the approval or construction of the project. I would express our opinion more affirmatively. In my view the provisions of section 23 of the Highway Act of 1968 effectively eliminated the application of any provisions of the D.C. Code which would conflict with the construction schedule or plans referred to in the Act for—

> those routes already under construction . . . [and] all routes [to be constructed] on the interstate system within the District of Columbia as set forth in the document entitled "1968 Estimate of the Cost of Completion of the National System of Interstate and Defense Highways in the District of Columbia" submitted to Congress by the Secretary of Transportation with, and as a part of, "The 1968 Interstate System Cost Estimate" printed as House Document Numbered 199, Ninetieth Congress. (82 Stat. 827)

The Congress clearly incorporated the 1968 District of Columbia Highway Estimate, and whatever it includes, into the law so that its plans, routes, specifications and schedules should be controlling.

Judge Fahy's opinion also concludes that pursuant to Title 16 U.S.C. § 470f, the Department of Transportation should be required to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to the Three Sisters Bridge project insofar as it may affect any district, site, building, structure or object that is included in the National Register. Section 470f was enacted on October 15, 1966.[1] It provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i-470n of this title a reasonable opportunity to comment with regard to such undertaking. (80 Stat. 917)

This requires the head of any Federal agency having jurisdiction over the Three Sisters Bridge to take into account the effect of that project on any area or structure included in the National Register and to afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such project.

An exchange of correspondence included in the record below[2] reveals that the Department of Transportation, on

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[1] The Department of Transportation became a department of the United States, effective April 1, 1967. Exec. Order No. 11340, March 30, 1967, 32 FED. REG. 5453; 49 U.S.C.A. § 1651 note; Department of Transportation Act, Pub. L. 89-670, October 15, 1966, 80 Stat. 931.

[2] Letter dated Feb. 8, 1968 from Mr. Mackey to Dr.

its own initiative, made a presentation at the February 7, 1968 meeting of the Advisory Council of the District of Columbia highway program in general and the Three Sisters Bridge project in particular. In the follow-up correspondence to this presentation, the Council's comments on these projects were expressly solicited. I find in this correspondence ample demonstration that the effects of the project on sites included in the National Register were considered within the Department of Transportation, and that the Advisory Council on Historic Preservation was given a reasonable opportunity to comment thereon. I accordingly respectfully dissent from the suggestion that the Council be afforded an additional opportunity to comment.

ON DENIAL OF A REHEARING BY THE DIVISION OF THE DECISION OF OCTOBER 12, 1971

FAHY, *Senior Circuit Judge,* with whom BAZELON, *Chief Judge, concurs:* On December 2, 1971, an order was entered denying appellees' suggestion for a rehearing en banc of the decision of October 12, 1971, which had been rendered by a three-judge division of the court. On the same date the division, consisting of Chief Judge Bazelon, Circuit Judge MacKinnon and myself, also denied a rehearing. Judge MacKinnon who had dissented from the decision of October 12, 1971, would have granted a rehearing. Each of us reserved the right to file later a statement of reasons for our position as to the denial of rehearing. This I now do in brief form.

Stevens, Def.'s Ex. 21, App. II at 529A; two letters dated Feb. 9, 1968 from Dr. Stevens to Mr. Mackey, Pltf.'s Exs. 63 & 64, App. II at 389A & 390A; letter dated Feb. 14, 1968 from Mr. Mackey to Dr. Stevens, Def.'s Ex. 36.

I

By §§ 23(a) and (b) of the Federal-Aid Highway Act of 1968, to which reference has been made in the foregoing Supplemental Opinion, Congress provided among other things that the Secretary of Transportation and the District of Columbia should resume construction of the abandoned bridge project as soon as possible after enactment, the construction to be

> "carried out in accordance with all applicable provisions of title 23 of the United States Code."

Work was to commence not later than 30 days after enactment. Work did commence but was brought to a halt by the litigation which questioned whether the construction was being carried out "in accordance with all applicable provisions of title 23 of the United States Code." This court had held in *D.C. Federation of Civic Ass'ns v. Volpe*, 140 U.S. App. D.C. 162, 434 F.2d 436 (1970), that the applicable provisions of Title 23 included those governing "both the planning and building" of the bridge. This interpretation of the intention of Congress created a conflict with the implications of the intention expressed in the 30-day clause. The difficulty was resolved of necessity by suspension of the work while the questions thus raised were settled. Obviously the substantive provisions of Title 23, involving, *inter alia*, vital decisions of the Secretary of Transportation, took precedence over the apparently inconsistent time provision. The project could not proceed in disregard of Title 23. Accordingly, our 1970 decision, next above cited, required a remand of the case to the District Court for an expedited hearing with respect to compliance with Title 23. The Government did not seek Supreme Court review of that decision, and it became the law of the case. The soundness of this court's remand was soon manifested by the further proceedings in the District Court which we reviewed in our decision of October 12, 1971. As the opinion

of the District Court on the remand revealed approval of the Bridge project had been given when the planning was incomplete and fell short of statutory requirements in important respects. Extant were questions even of structural feasibility, involving safety, as well as of final design and location of ramps and interchanges. Moreover, a finding that only the minimum acreage of parkland would be taken fell altogether short of the content necessary to meet the statutory requirement of minimum harm to parkland. Furthermore, the approved location of the bridge on the District of Columbia side of the river was 1500 feet off from the nearest location considered in the 1964 public location hearing. The District Court's opinion did not reveal a factual basis to support its conclusion that the approved location was so similar to that subject to the public hearing as to eliminate the need for a fresh location hearing.

The situation thus briefly outlined with respect to compliance with the applicable provisions of Title 23 called upon this court to hold that the approval given by the Secretary was, as a legal matter, not in conformity with the applicable statutes, and that the findings and conclusions of the District Court that they were, could not be accepted under the standards of judicial review applied in such a case by the Supreme Court in *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 414-15 (1971).

It is well to keep in mind that Title 23 of the United States Code is a comprehensive congressional enactment governing the deep involvement of the federal government in the Interstate Highway System, of which the Three Sisters Bridge was to be a part. The provisions of the Title could hardly find a more appropriate place for careful application than in and about the Capital of the nation, especially if a proposed project encroaches upon parklands and historic sites, both subjects of express congressional solicitude. It therefore was quite natural, not-

withstanding the desire that the bridge project proceed promptly, for Congress also to require compliance with the applicable provisions of Title 23. It is equally well to note, as the Government points out, that in such a project the Secretary must be permitted to make decisions in what might be called a progressive manner—not everything can be pulled together all at once. But when decisions necessary to final approval are made, such as those required with respect to parklands by Section 138 of Title 23, they must be made conditionally and tentatively, subject to readjustment and reconsideration as the process toward final determination goes forward. And final approval must await and be dependent upon completion of this process.

In thus briefly supplementing our October 12, 1971, opinion, we refer to it in the respects there more fully stated as reasons for our denial of the motion for rehearing.

MacKINNON, *Circuit Judge*, dissenting: I dissent from the denial of rehearing of the decision of October 12, 1971 for the reasons expressed in my opinion in that case, filed November 4, 1971.

The majority opinion comments that prior decisions on certain issues have become "the law of the case." While that rule of judicial practice imposes some restriction upon the trial court it does not prohibit the appellate court in a proper case from reconsidering its decision.[1] Also what

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[1] Lumbermen's Mutual Casualty Co. v. Wright, 322 F.2d 759, 763-764 (5th Cir. 1963); Mayflower Hotel Stock P. Com. v. Mayflower Hotel Corp., 89 U.S.App.D.C. 171, 193 F.2d 666, 669 (1951); General American Life Ins. Co. v. Anderson, 156 F.2d 615, 618-619 (6th Cir. 1946); White v. Higgins, 116 F.2d 312, 317 (1st Cir. 1940); Chicago, St. P., M. & O. Ry. v. Kulp, 102 F.2d 352, 354 (8th Cir.), cert. denied, 307 U.S. 636 (1939); Reynolds Spring Co. v. L. A. Young Industries, 101 F.2d 257, 259 (6th Cir. 1939).

is the law of the case with respect to the Court of Appeals is not the Supreme Court's law of the case.[2]

However, I concur in the statement expressed at page 14 of the majority opinion that would allow Government agencies to make decisions conditionally and tentatively in a progressive manner. This conforms to the view expressed in my dissenting opinion filed November 4, 1971 in which I stated that I would permit work to proceed upon the *excavation* for the piers of the Three Sisters Bridge because Congress has approved the project, the necessary appropriations were available and the excavation is in the nature of a preliminary test since preconstruction borings are not conclusive.

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[2] White v. Higgins; *supra* note 1.

[3] Slip op. 15.